Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 28, 2004

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QUESTION PRESENTED

WHETHER THE SIX YEAR LIMITATION PERIOD SET OUT IN 31 U.S.C. § 3731(b) SHOULD BE APPLIED TO RETALIATORY DISCHARGE ACTIONS UNDER THE FALSE CLAIMS ACT OR WHETHER COURTS SHOULD APPLY THE MOST CLOSELY ANALOGOUS STATE LIMITATION PERIOD.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court of appeals were as follows:

United States of America ex rel. Karen T. Wilson was the plaintiff-appellant in the court of appeals.

Graham County Soil & Water Conservation District, Cherokee County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Lloyd Millsaps, Bill Tipton, C.B. Newton, and Eddie Wood were defendant-appellees in the court of appeals and are the parties petitioning for certiorari.

Raymond Williams, Dale Wiggins, Lynn Cody, Graham County were defendant-appellees in the court of appeals and are not petitioning for certiorari.

Richard Greene, William Timpson, Keith Orr, Jerry Williams, Billy Brown, were listed in the caption of the court of appeals as defendant-appellees, but did not file notice of appearance, join the brief of the appellees or participate in the appeal and are not petitioning for certiorari.

Graham County Board of County Commissioners, Cherokee County Board of County Commissioners, Cherie Greene, Ricky Stiles, Betty Jean Orr, Joyce Lane, Jimmy Orr, Eugene Morrow, Charles Lane, Charles Laney, George Postell, Lloyd Kissleburg, Ted Orr, Bernice Orr, John Doe, John Doe Corporations, and defendant, Government Entities 1-99 were

defendants in the district court but did not participate in the court of appeals proceedings.

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Graham County Soil & Water Conservation District, Cherokee Soil & Water Conservation District, Bill Tipton, Eddie Wood, C.B. Newton, Gerald Phillips, Allen DeHart and Lloyd Millsaps respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at *United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004). The order denying rehearing is unreported (Pet. App. 122a-123a). The district court's opinion granting Defendants' motion to dismiss is not reported (Pet. App. 46a-71a). The district court's denial of Plaintiff's motion for reconsideration and the district court's certification that the matter is ripe for review pursuant to 28 U.S.C. § 1292(b) is reported at 224 F. Supp. 2d 1042 (Pet. App. 72a-88a). The Memorandum and Recommendation of the United States Magistrate Judge is unreported (Pet. App. 89a-121a).

JURISDICTION

The Court of Appeals entered its judgment on April 29, 2004 (Pet. App. 1a-41a) and rehearing was denied on June 28, 2004 (Pet. App. 122a-123a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the False Claims Act, 31 U.S.C. §§ 3729-3733. The False Claims Act is set out in Petitioners' Appendix at 124a-158a.

STATEMENT OF THE CASE

On March 7, 1997, Plaintiff Karen T. Wilson (hereinafter "Wilson") resigned as a secretary at the Graham County Soil & Water Conservation District. Over three years and ten months later, Wilson filed the present action. Wilson alleges that she was harassed by Petitioners for exposing various false claims for reimbursement made to certain federally funded programs. Specifically, she claims that Petitioners retaliated against her in violation of 31 U.S.C. § 3730(h) of the False Claims Act. The jurisdiction of the District Court was based upon 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331.

Petitioners moved to dismiss Wilson's retaliatory discharge claim in that it was barred by the applicable limitation period (three years under North Carolina law). The District Court agreed that Wilson's retaliatory discharge claim was time barred and dismissed this claim. On April 29, 2004, a divided panel of the Fourth Circuit reversed the District Court. The panel concluded that claims under 31 U.S.C. § 3730(h) are governed by the limitation period set out in 31 U.S.C. § 3731(b)(1) (a six-year period). The Fourth Circuit opinions focuses upon the language of 31 U.S.C. § 3731(b) which provides:

> A civil action under section 3730 may not be brought - -

> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2004). The Fourth Circuit noted that Section 3730, creates three separate causes of action. 367 F.3d at 248 (Pet. App. 5a). Section 3730(a) creates a cause of action that may be brought by the Attorney General when the Government has been damaged by a false claim. Section 3730(b) provides for the filing of a qui tam action by an individual. Section 3730(h) creates a cause of action for retaliatory discharge when an employee has been discriminated against for pursuing a false claim action. As the Fourth Circuit noted, Section 3729 "creates and defines the parameters of liability for presenting a false claim to the Government." 367 F.3d at 248 (Pet. App. 5a).

Relying upon the language of these sections, the Fourth Circuit concluded that Congress intended to bar any retaliatory discharge claim that is not brought within six years from the date the false claim was submitted to the Government: "[T]he effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under

§ 3730(h), may be brought no more than six years after the date on which the underlying violation was committed." 367 F.3d at 248 (Pet. App. 5a-6a). Recognizing that this issue has "divided both our sister circuits and courts within this circuit," the Fourth Circuit rejected the rationale of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). 367 F.3d at 249 (Pet. App. 8a). In *Lujan*, the Ninth Circuit concluded that 31 U.S.C. § 3731(b) does not provide a limitation period for retaliatory discharge claims, because the limitation period in this section only addresses violations of Section 3729 and Section 3729 has no bearing upon retaliatory discharge actions. In its decision, the Fourth Circuit expressly rejected the Ninth Circuit's decision and instead adopted the rationale of the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

Noting that this issue was difficult and divisive, Judge Wilkinson dissented. In his dissent, he reasoned that the Fourth Circuit's opinion cannot be squared with the literal language of the False Claims Act and is not consistent with Congressional intent. Moreover, he concluded that the majority's decision "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." 367 F.3d at 257 (Wilkinson, J., dissenting) (Pet. App. 28a-29a).

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve a split among the circuit courts as to the appropriate limitations period for retaliatory discharge actions under the False Claims Act. In the absence of a ruling by this Court,

employers and employees will face uncertainty and inconsistent outcomes as to what limitation period governs. Given the breadth and magnitude of litigation arising under the False Claims Act, the resolution of this issue is important to the Government, Government contractors and employees throughout the Country. The petition should be granted in order to resolve this significant issue and to correct the erroneous decision of the Fourth Circuit.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUIT COURTS.

In holding that a six year limitation period applies to retaliatory discharge actions under the False Claims Act, the Fourth Circuit expressly disagreed with the decision of the Ninth Circuit in *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998) (applying most closely analogous state limitation period). In doing so, the Fourth Circuit has joined the Third and Seventh Circuit on this issue. Thus, four separate circuit courts have now addressed whether a six year statute of limitations or the most analogous state statute of limitation should be applied to retaliatory discharge actions under the False Claims Act. *United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003), *cert. denied*, 158 L. Ed. 2d 469 (2004); *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998); *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994). The division that exists among the circuit courts is unlikely to be resolved in the absence of a ruling by this Court. As Judge Wilkinson noted in

his dissent, "This is not an easy case, and there exists a square conflict between the [circuit courts]." 367 F.3d at 257 (Pet. App. 28a); *Grand ex rel. United States v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1992) (noting that this is a "difficult issue"). Numerous commentators have also recognized that given the split among the circuits and the various arguments that have been made on both sides, the ultimate resolution of this issue is far from clear. *See, e.g.*, J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-204 (Supp. 2000).

On the one hand, the Ninth Circuit has held that because the False Claims Act does not provide for a specific limitation period with respect to retaliation claims, courts must apply the most closely analogous statute of limitations under state law. *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). In *Lujan*, the plaintiff relied upon the language of 31 U.S.C. § 3731(b)(1) which states that "a civil action under section 3730" may be brought within six years of the date "on which the violation of section 3729 is committed." The plaintiff argued that because the retaliatory discharge provision is set out in 31 U.S.C. § 3730(h) and this subsection is within Section 3730, a six year period must be applied to retaliation claims. The Ninth Circuit rejected this reading of 31 U.S.C. § 3731(b)(1), noting that "[t]he answer is not so simple." 162 F.3d at 1034.

The Ninth Circuit concluded that the language and legislative history of the False Claims Act demonstrates that Congress did not intend for a six year limitation period to apply to retaliation claims. The Ninth Circuit noted that prior to 1986, when Congress first added a retaliatory discharge provision to the False Claims Act, Section 3731(b) provided that a "'civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.'" 162 F.3d at

1034 (quoting 31 U.S.C.A. § 3731(b) (West 1983)). When the retaliatory discharge provision was added in 1986, Section 3731(b) was changed so as to tie the six years to the date "'the violation of section 3729 is committed.'" *Id.* (quoting 31 U.S.C.A. § 3731(b)(1) (West Supp. 1998)). Because Section 3729 relates solely to substantive violations of the False Claims Act and does not address retaliation, the Ninth Circuit concluded that Congress did not intend to apply a six year period to retaliation claims:

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 amendments to the [False Claims Act]. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.
>
> That Congress was specifically concerned with false claims in its 1986 amendments to the statute of limitations is further illustrated by its addition of section 3731(b)(2). This section provides an alternative to the six-year statute of limitations for false claims, namely a period of no more than three years after material facts should have been known by the relevant government official, but never longer than ten years after the violation was committed. 31 U.S.C. § 3731(b). The legislative history to this

section indicates that this change was enacted to "ensure the Government's rights are not lost through a wrongdoer's successful deception," because "fraud is, by nature, deceptive . . . ." S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

The same rationale is inapposite to a private claim for retaliation. There is nothing covert or deceptive about retaliation – the victim feels its sting immediately. In the absence of some meaningful indication to the contrary, we must therefore presume that, in amending section 3731(b) so that the limitation runs only from the date of a violation of section 3729, Congress did not intend that the statute apply to section 3730(h).

> 162 F.3d at 1034.

On the other hand, the Seventh Circuit has rejected this rationale. In *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), the Seventh Circuit concluded:

> Section 3731(b)(1) allows six years to file suit under § 3730 from "the date on which the violation of § 3729 is committed." Section 3729 deals with making false claims. Neal filed this suit under § 3730 within six years of Honeywell's false claims. It is therefore timely.

Id. at 865. The Seventh Circuit proceeded to dismiss the employer's argument that such a statutory construction is

illogical because it could lead, in certain circumstances, to retaliatory discharge claims being time barred before they accrue. The Seventh Circuit reasoned that this six year period was akin to a statute of repose and therefore concluded that there was "no absurdity in the statute." *Id.*

In addition to the Seventh Circuit, the Third Circuit has held that a six year limitation period is to be applied to retaliatory discharge claims under the False Claims Act. *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003). In *Malloy,* however, the Third Circuit simply applied a six year limitation period without discussion of the issue. District courts in the Third Circuit have also applied a six year limitation period to retaliatory discharge actions under the False Claims Act. *See United States ex rel. Cantekin v. University of Pittsburgh,* 1997 U.S. Dist. LEXIS 22868 (W.D. Pa. 1997).

In the present action, the Fourth Circuit noted that the "proper interpretation of these provisions [of the False Claims Act] has divided both our sister circuits and courts within this circuit." 367 F.3d at 249 (Pet. App. 8a). The Fourth Circuit expressly rejected the rationale of the Ninth Circuit and adopted that of the Seventh Circuit. The Fourth Circuit concluded: "we find no ambiguity undermining the conclusion that Congress intended the revised limitation period of § 3731(b) to apply to all claims under § 3730, including retaliation claims under § 3730(h)." *Id.* at 250-51 (Pet. App. 9a-10a). In his dissent, Judge Wilkinson expressed his belief that the view of the Ninth Circuit's decision was the better reasoned approach: "In my judgment, the *Lujan* court advances the better interpretation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000)." 367 F.3d at 257 (Wilkinson, J., dissenting) (Pet. App. 28a).

The Fourth Circuit's decision therefore deepens an existing split between the circuit courts. Review is warranted to resolve this conflict.

II. THE FOURTH CIRCUIT'S OPINION RAISES AN IMPORTANT ISSUE OF FEDERAL LAW

Whether courts should apply a six year statute of limitations to retaliatory discharge claims under the False Claims Act or the most closely analogous state law limitation period is an important question of federal law. Few, if any, statutes have had a greater impact upon how our Government does business with private contractors than the False Claims Act. During the past year alone, the United States recouped $2.1 billion from government contractors under the False Claims Act. Press Release, United States Department of Justice, Justice Dept. Civil Fraud (Nov. 10, 2003). This legislation has been appropriately described as "the most effective single law in history for individual whistleblowers to have an impact against corruption." Hearing on S. 1358 Before the Senate Gov't Affairs Comm., 108 Cong. (Nov. 12, 2003). Whether congressional intent is correctly applied by the courts with respect to the whistleblower protections created by this legislation has far-reaching impact upon the Government, private employers and employees who report fraud against the Government.

The question as to what limitations period Congress intended with respect to retaliatory discharge claims under the False Claims Act is a recurring issue. As set out above, federal courts have divided on the issue of whether a six year limitation period or analogous state law limitation periods should be

applied to retaliatory discharge claims brought under the False Claims Act. Although numerous courts have already ruled upon this issue, this issue will continue to arise in qui tam proceedings. Since 1986, when Congress adopted the retaliatory discharge provisions of the False Claims Act, over 4,000 actions have been filed by qui tam plaintiffs. Press Release, United States Department of Justice, Justice Dept. Recovers Over $1 Billion in FY 2002 (Dec. 16, 2002). The sheer number of qui tam actions (and resulting retaliatory discharge claims) before the federal courts ensures that this issue will be litigated and argued in federal courts throughout the Country until definitively resolved by this Court.

Moreover, this appeal has significant economic impact upon employers throughout the Country. Under the Fourth Circuit's opinion, an employee who is discharged in violation of 31 U.S.C. § 3730(h) may sit on his or her rights and wait to file a complaint until six years from the underlying False Claims Act violation. Given the fact that 31 U.S.C. § 3730(h) provides for double recovery of back pay, the effect of the Fourth Circuit's decision is to allow claimants to recover over twelve year's worth of salary by manipulating when a complaint is filed. In sharp contrast to 31 U.S.C. § 3730(h), on the numerous other occasions that Congress has enacted whistleblower protection, Congress has generally restricted the limitation period to two years or less.[1] When Congress has provided employees with a

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[1] *See* Federal Deposit Insurance Act, 12 U.S.C. § 1831j (two year limitation period); National Labor Relations Act, 29 U.S.C. §§ 158, 160 (six months); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (180 days); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855 (180 days); Energy Reorganization Act, 42 U.S.C. § 5851 (180

remedy of reinstatement or back pay, Congress has consistently kept the limitation period short in order to offset the mounting back pay claims that employers and the Nation's economy would otherwise face. *See, e.g., Early v. Bankers Life & Casualty*, 959 F.2d 75, 80-81 (7th Cir. 1992) ("The short statutes of limitations in employment cases have a purpose - - both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved - - and it is ill served when the employer does not receive prompt notice of the dispute."). The Fourth Circuit's opinion undermines congressional intent and imposes upon employers significant potential liability – far beyond the burden Congress intended for American employers to bear.

The Fourth Circuit's interpretation of 31 U.S.C. § 3730(h) also constitutes a significant departure from every other whistleblower statute enacted by Congress in that it ties the commencement of the limitation period to the underlying statutory violation rather than the date of the discharge. As Judge Wilkinson vehemently argued in his dissent:

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days); TSCA (asbestos), 15 U.S.C. § 2651 (90 days); Sarbanes-Oxley, 18 U.S.C. § 1514A (90 days); Aviation Investment and Reform Act, 49 U.S.C. §42121 (90 days); Safe Containers for International Cargo Act, 46 U.S.C. app. § 1506 (60 days); Federal Mine Safety and Health Act, 30 U.S.C. § 815 (60 days); Federal Surface Mining Act, 30 U.S.C. § 1293 (30 days); Clean Air Act, 42 U.S.C. § 7622 (30 days); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (30 days); Solid Waste Disposal Act, 42 U.S.C. § 6971 (30 days); Water Pollution Control Act, 33 U.S.C. § 1367 (30 days); CERCLA, 42 U.S.C. § 9610 (30 days); TSCA, 15 U.S.C. § 2622 (30 days); OSHA, 29 U.S.C. § 660 (30 days). On other occasions, Congress has declined to specifically adopt a limitation period. *See* ERISA, 29 U.S.C. § 1140.

The majority's interpretation is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts. By holding that the statute of limitations for anti-retaliation actions is set in motion by some independent event, rather than by the retaliatory acts themselves, the majority denies employees adequate notice of when they can bring a claim. Indeed, the majority's interpretation may fail to provide any notice *at all* to employees as to when their claims may commence or be foreclosed. There is a reason that statutes of limitations for anti-retaliation actions begin with the alleged retaliatory event. Because the retaliation bears adversely on the affected employee, it serves as the best possible notice that the employee may henceforth seek redress.

The same reason suggests why Congress did not mandate a six-year statute of limitations for section 3730(h) actions. Since false claims themselves are acts of deception, it makes sense for a longer statute of limitations to provide time to uproot the deception. But this is simply not a concern for employees under section 3730(h) who will feel the sting of the retaliatory actions at the moment they occur.

The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin

> to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act. In short, I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

367 F.3d at 260 (Pet. App. 35a-36a) (citations omitted). The effect of the Fourth Circuit's opinion is to replace a clear and definite date for the commencement of the limitations period (the employee's date of discharge) with a commencement date that is fraught with uncertainty. Although an employee will always know his or her date of discharge, in many cases, the employee will not know when the alleged fraud upon the Government occurred. Because litigants can no longer look to the act of discharge and calculate the applicable limitations period from that date, both the employee and employer must conduct discovery and litigate the underlying False Claims Act violation before ever determining whether the retaliatory discharge claim is stale. Accordingly, the decision has a significant impact upon litigation costs (and judicial resources) in retaliatory discharge actions.

Finally, the Fourth Circuit's decision threatens to undermine the limitations periods for every other whistleblower statute enacted by Congress. The limitations periods for each of these statutes is significantly less than six years; many of these statutes require the employee to act within 30 days of the discharge. *See supra* p. 11 n.1. With the decisions of the Third, Fourth and Seventh Circuits that a six year limitation period applies to 31 U.S.C. § 3730(h), employees who miss the filing deadlines under these other whistleblower statutes will simply

repackage their retaliation claim as one arising under the False Claims Act. To do so, the employee must merely assert that the alleged wrongdoing touches upon some aspect of Government spending. Given the Government's pervasive presence as a purchaser of goods and services, virtually every whistleblower claim from the Aviation Investment and Reform Act to the Federal Deposit Insurance Act can be repackaged as a claim under the False Claims Act. Thus, the Fourth Circuit's imposition of a six year statute of limitations has significant and far reaching implications upon every whistleblower statute enacted by Congress.

Here, the plaintiff is seeking back pay from March 7, 1997. Given the double damage provision of the False Claims Act, she is effectively seeking to recover 15 years of salary. Despite her delay in filing this action, the Fourth Circuit has allowed her claim to go forward. Not only does that decision force the defendants before the Court to defend a stale claim in which back pay damages are mounting with each passing day, the decision has far-reaching implications upon all employers doing any form of business with the United States Government.

III. THE FOURTH CIRCUIT ERRED IN APPLYING A SIX YEAR LIMITATION PERIOD TO RETALIATORY DISCHARGE ACTIONS UNDER THE FALSE CLAIMS ACT.

This Court should also grant certiorari in that the Fourth Circuit clearly erred in applying a six year limitation period to claims brought under 31 U.S.C. § 3730(h). The Fourth Circuit's

construction of this statute is contrary to the language of the False Claims Act, misconstrues congressional intent, and produces an illogical and unmanageable scheme for limiting stale claims.

1. The Fourth Circuit's construction of the False Claims Act is contrary to the language of that Act.

The retaliatory discharge provision of the False Claims Act is found at 31 U.S.C. § 3730(h). This sub-section provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h) (2004). Section 3729 of the False Claims Act, 31 U.S.C. § 3729, sets out the conduct that constitutes the submission of a false claim to the Government. Section 3729 speaks only to the underlying False Claims Act violation and contains no reference to wrongful discharge or any act that would constitute a violation of 31 U.S.C. § 3730(h).

Section 3731 of the False Claims Act provides as follows:

> (b) A civil action under section 3730 may not be brought - -
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2004). The Fourth Circuit concluded that because the retaliatory discharge provision falls within Section 3730, the language of Section 3731 requires that a six-year limitation period be applied to such claim. Section 3731, however, only addresses the limitation period for an underlying

violation of the False Claims Act, not a retaliatory discharge claim. As Judge Wilkinson explained in his dissent:

> The text of [31 U.S.C. § 3731(b)] could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees. Indeed, an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations, which would leave the statute of limitations without a starting point. Retaliation by an employer may also occur more than six years after the employer committed the false claims violations, which would leave the employee without a cause of action. Therefore, it seems incongruous to say the least that an employee's ability to bring retaliatory claims should turn on when or whether the employer has submitted false claims to the government in violation of section 3729.

367 F.3d at 258 (Wilkinson, J., dissenting). The limitation period in Section 3731(b) is directly tied to a "violation of section 3729." Section 3729, in turn, "strictly addresses false

claims, not retaliation claims." *Lujan v. Hughes Aircraft Co.*, 162 F.3d at 1034. Thus, the language of the limitations period set out in Section 3731(b) "clearly speaks only to the underlying False Claims Act violation." J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-204 (Supp. 2000). Accordingly, the structure and language of the False Claims Act make clear that Congress did not provide for a specific statute of limitations with respect to retaliatory discharge claims arising under the Act.

2. The Fourth Circuit's decision misconstrues and ignores congressional intent.

As set out in the legislative history of the 1986 amendments to the False Claims Act, the Act's whistleblower provisions were modeled after eight other statutes that had been previously enacted by Congress:

> [T]he Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers," as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.
>
> In forming these protections, the Committee was guided by the whistleblower protection provisions found in Federal safety and environmental statutes including the Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act

42 U.S.C. 300j-9, Solid Waste Disposal Act, 42. U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622.

S. Rep. No. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. Like 31 U.S.C. § 3730(h), each of these eight whistleblower statutes provides that an employee who has suffered retaliation may be reinstated to his or her position and recover back pay. These statutes further provide that an employee loses his or her right to pursue a whistleblower claim unless the claim is asserted within a relatively short time period from the discharge. The longest period that any of these eight statutes allows for the filing of a claim is180 days from the discharge or discrimination. The vast majority of these statutes provides that a claim must be asserted within 30 days of the discharge.

In contrast to these eight statutes, the Fourth Circuit has concluded that the time period for filing a retaliation claim under the False Claims Act is six years and that this period runs from the date of the underlying False Claims Act violation rather than the date of the retaliatory act. No other whistleblower statute enacted by Congress has ever had a limitations period even remotely approaching six years. Moreover, every one of these statutes provides that the limitations period begins running upon the act of discharge or discrimination. Had Congress truly intended to make such a radical departure from other whistleblower statutes, this intent would have undoubtedly been discussed at length during congressional debate. No such debate

occurred. In fact, as set out below, *infra* pp. 21-25, the discussion of the 1986 amendment during congressional debate reflects that Congress believed that the six year limitation period does not apply to retaliatory discharge claims under 31 U.S.C. § 3730(h).

Sound public policy reasons exist for Congress' decision to enact relatively short limitation periods with respect to whistleblower statutes. When a statute provides for reinstatement, the longer an employee delays in asserting his or her rights, the more difficult it is for the employer to reinsert the employee into the same position. Moreover, when Congress provides for recovery of back pay, a lengthy limitation period may result in economic waste in that it encourages an employee to sit on his or her claim in order to recover the greatest possible damages. *See, e.g., Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (Congress intended short limitation period when "damages such as backpay may be mounting"); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (limitation periods "protect employers from the burden of defending claims arising from employment decisions that are long past"). As Judge Posner has noted, "The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990).

Although the Fourth Circuit purports to base its decision on the legislative history of the 1986 Amendments to the False Claims Act, the Fourth Circuit utterly ignores debate on the floor of Congress that clearly shows that Congress never intended to apply a six year statute of limitation to claims brought under 31 U.S.C.§ 3730(h). In its opinion, the Fourth Circuit notes that the

original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734). *See* 367 F.3d at 252 (Pet. App. 15a-16a). Thereafter, Congress condensed the act by simply placing this proposed new section as a sub-section within 31 U.S.C. § 3730. The majority opinion concludes that this renumbering of the statute evidences Congress' intent that a six year statute of limitations be applied to retaliatory discharges:

> Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply.

367 F.3d at 252 (Pet. App. 16a) (citations omitted). The Fourth Circuit, however, ignores the fact that both before and after the renumbering of the statute, Congress clearly understood and believed that this six year limitation provision would only be applied to violations of the False Claims Act brought on behalf of the Government (as opposed to retaliatory discharge claims brought by an employee for the sole benefit of the employee).

On December 12, 1985, the Senate Judiciary Committee reported favorably on the proposed amendments to the False

Claims Act (Senate Report No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266). As of that date, the retaliatory discharge provisions were to be set out as a separate section (31 U.S.C. § 3734) and had not yet been moved into 31 U.S.C. § 3730. In addition to adding whistleblower protection to the False Claims Act, the proposed amendments enlarged the limitations period with respect to claims brought on behalf of the Government. In its discussion of this change, the Senate Report makes clear that the six year statute of limitations (as amended by the proposed legislation) only relates to False Claims Act violations brought for the benefit of the Government:

> Seventh, the subcommittee added a modification of the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when **the Government** learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure **the Government's** rights are not lost through a wrongdoer's successful deception.

S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (emphasis added). As reflected by this Senate Report, the proposed amendments (as they existed as of December 12, 1985) were not intended to create a six year limitations period for retaliatory discharge claims. Rather, the six year limitation period and the new tolling provision were

limited to claims brought on behalf of **the Government** to "ensure **the Government's rights** are not lost."

In September 1986, Congress altered the bill as it had been reported by the Senate and House Judiciary Committees. As part of those changes, the retaliatory discharge provision (proposed as a new section 31 U.S.C. § 3734) was moved into 31 U.S.C. § 3730. 132 Cong. Rec. 22,332 & 28,576 (1986). Following the renumbering of the statute, however, Congress continued to view the six year limitation period as being applicable only to False Claims Act violations brought on behalf of the Government. On September 9, 1986, Congressman Fish of New York, in discussing the revised bill, stated in floor debate:

> Section 5 amends the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted, the current standard, or within 3 years after **the Government** learns of the violations, whichever is later.

132 Cong. Rec. 22,337 (1986). Thus, even after the consolidation of the whistleblower provisions into Section 3730, Congress believed that the six year limitation period was only applicable to claims brought on behalf of the Government. The six year limitations period was not intended to apply to employees making a retaliation claim for their own personal benefit. Rather than supporting the position taken by the Fourth Circuit, the legislative history of the 1986 amendments to the False Claims Act demonstrates that Congress did not intend to

apply a six year statute of limitations to retaliatory discharge claims.

3. The Fourth Circuit's decision is illogical and creates an unmanageable scheme for determining when the limitation period commences.

Under the Fourth Circuit's decision, the limitation period for a retaliatory discharge claim under the False Claims Act begins to run from the date of "the violation of Section 3729." Thus, the Fourth Circuit ties the limitation period not to the act of retaliation, but to the date of the underlying False Claims Act violation. In doing so, the Fourth Circuit produces a result that is illogical and is contrary to every other whistle-blower statute enacted by Congress.

First, the Fourth Circuit's decision fails to provide employers and employees with adequate notice as to when the statute of limitations begins to run. Under every whistleblower statute in this Country, the limitations period begins to run upon the act of the discharge or retaliation. The reason is simple – employees know immediately when they have been fired. The injury resulting from the retaliatory act is open and obvious. In contrast, in many cases an employee will not know with specificity the date on which a violation of Section 3729 first occurred.

Second, the Fourth Circuit's interpretation of the False Claims Act leads to the absurd result that the retaliatory discharge claim of some whistleblowers will be time barred even before the act of discharge. Under the Fourth Circuit's decision, the limitations period begins running six years from the time the

employer submits a false claim to the Government. If an employee discovers a false claim years after the claim was submitted and proceeds to blow the whistle, Section 3730(h) will not protect the employee from retaliation. As courts and commentators have noted, it would be a "bizarre result" if an employee who brings a false claim action immediately prior to the expiration of the six year period could be fired shortly thereafter and yet the employee's retaliatory discharge claim would be time-barred. J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-205 to -206 (Supp. 2000).

Third, the Fourth Circuit's decision creates "an unprecedented oddity" in that while some employees will see their retaliation claim time barred even before the act of discharge, for other employees, their claim will never be time-barred. *Graham County Soil & Water*, 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a). A retaliatory discharge claim may occur even when there has been no violation of Section 3729. S. Rep. No. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. Thus, under the rationale adopted by the Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on his or her employer, any retaliatory discharge claim brought by that employee will never be time barred. For such employees, the stop watch upon the limitations period is never started because there has been no "violation of Section 3729."

The Fourth Circuit decision imposes upon the False Claims Act a framework for determining whether a retaliatory discharge claim is time barred that is both illogical and inconsistent with congressional intent. Given the language of the Section 3730, the legislative history of the 1986 amendments and the bizarre outcomes that flow from tying the limitation

period to anything other than the date of the retaliatory act, it is clear that Congress did not intend for a six year period set out in 31 U.S.C. § 3731(b) to apply to retaliatory discharge claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 28, 2004

*Counsel of Record

APPENDIX

APPENDIX

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

No. 03-1122

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

367 F.3d 245; 2004 U.S. App. LEXIS 8477; 21 I.E.R. Cas. (BNA) 507

October 28, 2003, Argued
April 29, 2004, Decided

OPINION

[*247] DUNCAN, Circuit Judge:

Karen Wilson brought a *qui tam* action under the Federal False Claims Act, 31 U.S.C. §§ 3729-3733 (2000) ("the FCA" or "the Act"), alleging that her coworkers had submitted false claims to the federal government in violation of the FCA and that she was constructively discharged in retaliation for reporting these activities. Deciding that the six-year limitations period of the FCA did [**2] not apply to the retaliation claim, the district court applied North Carolina's three-year limitations period for wrongful discharge actions and dismissed Wilson's claim as untimely. Because we conclude that the six-year limitations period of the FCA does apply to retaliation claims under the Act, we reverse the district court's dismissal and remand for further proceedings.

I.

Wilson is a former part-time secretary at the Graham County Soil & Water Conservation District ("the

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

Conservation District"). On January 25, 2001, Wilson filed a *qui tam* action pursuant to § 3730(b) of the FCA, alleging that several of her former coworkers at the Conservation District had intentionally submitted false claims for reimbursement from three programs created or funded by the federal government. Wilson's complaint further alleged that after she reported her concerns in a letter to federal authorities, her supervisors and coworkers initiated a pattern of harassment that precipitated her resignation on March 7, 1997.

The Appellees moved to dismiss Wilson's claims under Federal Rule of Civil Procedure 12(b)(6). The Appellees argued that the FCA's statute [**3] of limitations did not apply to retaliation, and thus the timeliness of Wilson's claim should be controlled by North Carolina's three-year statute of limitations for wrongful discharge. The district court concluded that applying the FCA's limitations provision to retaliation claims could lead to absurd results, and that the timeliness of Wilson's claim should be controlled by North Carolina law. Agreeing with the Appellees that the closest analogous limitations period was the three-year period applicable to claims of wrongful discharge, *see* N.C. Gen. Stat. § 1-52(5) (1999), the district court concluded that the retaliation claim in Wilson's complaint of January 25, 2001, based on her constructive discharge of March 7, 1997, was untimely.

Wilson filed a motion for reconsideration of the statute of limitations issue. The district court denied Wilson's

request for reconsideration, but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (2000). We granted Wilson's timely petition for authorization to pursue this appeal.

II.

We review de novo the district court's order granting the Appellees' Rule 12(b)(6) motion [**4] to dismiss, *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002), as well as its statutory construction of the FCA, *see United States v. Jefferson-Pilot Life Ins. Co.*, 49 F.3d 1020, 1021 (4th Cir. 1995). It is axiomatic that when interpreting a statute, the starting point is the language employed by Congress, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 71 L. Ed. 2d 748, 102 S. Ct. 1534 (1982), and where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms,'" *United States v. Ron Pair* [*248] *Enters.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)). In determining whether the language is plain, courts must look to "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). If the language of the statute is ambiguous, in that it lends itself to more than one reasonable interpretation, our obligation is "to find that interpretation which can [**5] most fairly be said to be imbedded in the statute, in the sense of being most

harmonious with its scheme and with the general purposes that Congress manifested." *Comm'r v. Engle*, 464 U.S. 206, 217, 78 L. Ed. 2d 420, 104 S. Ct. 597 (1984) (internal quotation omitted). A departure from the literal text of a statute is also appropriate if "a literal application would frustrate the statute's purpose or lead to an absurd result." *Nat'l Coalition for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998) (quoting *Robinson*, 519 U.S. at 340).

Three sections of the FCA determine whether the timeliness of Wilson's retaliation claim is governed by the Act itself or state law. The FCA's limitations period, § 3731(b), provides that

> [a] civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed . . . .

§ 3731(b)(1). n1 Section 3730 creates three causes of action arising under the FCA: an action for compensation filed by the Attorney General, *see* § 3730(a); a *qui tam* action filed by an individual, *see* § 3730(b); and an action [**6] for retaliatory conduct predicated on identified protected activity, *see* § 3730(h). Section § 3729 creates and defines the parameters of liability for presenting a false claim to the Government. Hence, the effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be

brought no more than six years after the date on which the underlying violation was committed.

> n1 Section 3731(b)(2) states that, in the alternative, a civil action under § 3730 may not be filed "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." However, because neither party advances this alternative limitations period as controlling, and "there is no 'official of the United States charged with responsibility to act in the circumstances' that are presented in a typical retaliation case," *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 n.20 (E.D. Va. 2001), we limit our analysis to § 3731(b)(1).

[**7]Both the retaliation provision of § 3730(h) and the limitations provision of § 3731(b)(1) are relatively recent additions to the FCA. Prior to 1986, the FCA did not specifically include a cause of action for retaliation. Section § 3731(b) stated simply that "'a civil action under Section 3730 of this title must be brought within six years from the date the violation is committed.'" *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998)

(discussing the 1986 amendments). Congress's stated intent in amending the FCA was "not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. [*249] No. 99-345, at 1-2 (1986) (hereinafter "S. Rep."), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. Toward that end, Congress also added § 3730(h), n2 which provides a remedy for any employee who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" as a result of lawful acts by the employee in furtherance of an action under the FCA.

> n2 In full, this subsection provides that:
> "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."§ 3730(h).

[**8]The proper interpretation of these provisions has divided both our sister circuits and courts within this circuit. n3 In *United States ex rel. Lujan v. Hughes Aircraft Co.*, the Ninth Circuit held that § 3731(b)(1) did not apply to retaliation claims under the FCA. 162 F.3d at 1034-36. The *Lujan* court reasoned that the 1986 amendments, "while adding a provision for retaliation claims under § 3730(h), narrowed the application of the six-year statute of limitations to violations of § 3729," such that the amendments "created the retaliation claim but provided no specific statute of limitations for such claims." *Id.* In view of this perceived absence of a congressionally prescribed statute of limitations, the Ninth Circuit concluded that "the most closely analogous statute of limitations under state law" must fill the void. *Id.* at 1035 (citing *Reed v. United Transp. Union*, 488 U.S. 319, 323, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989)).

n3 Compare *Storey*, 207 F. Supp. 2d at 444 (applying § 3731(b)(1) to retaliation claims under § 3730(h)), *with United States ex rel. Ackley v. IBM*, 110 F. Supp. 2d 395, 401-05 (D. Md. 2000) (assuming, without deciding, that § 3731(b)(1) did not apply to retaliation claims under § 3730(h) for the reasons described by the court below).

[**9]In contrast, in an earlier decision which the court in *Lujan* failed to distinguish or cite, the Seventh Circuit found no difficulty in applying § 3731(b)(1) to retaliation claims

under § 3730(h). *See Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994). n4 The employer in *Neal* made the same argument accepted by the district court (and propounded by the dissent). Expressing a concern for the rights of employees generally (although, similar to the dissent here, not the employee who filed the complaint at issue), the employer contended that § 3731(b)(1) could not apply to retaliation claims, as a literal application of its terms would lead to absurd results. The *Neal* court disagreed, concluding that the revised language of § 3731(b)(1) reflected Congress's decision to prioritize "simplicity of administration," and that the employer had mischaracterized the consequences of a literal reading of the statute. n5 *Id.* at 865. Against this backdrop, we consider Wilson's contention that the district court erred in declining to apply § 3731(b)(1) to her retaliation claim under § 3730(h).

n4 Like the court in *Lujan* on which so much of its reasoning relies, the dissent does not address *Neal* or its analysis. [**10]

n5 The United States' brief in *Neal*, filed as an *amicus curiae* at the invitation of the court, "concluded that the statute supports Neal without a thumb on the scales of justice." 33 F.3d at 863.

III.

Starting, as we must, with the text of the FCA, we find no ambiguity undermining [*250] the conclusion that Congress intended the revised limitations period of

§ 3731(b)(1) to apply to all claims under § 3730, including retaliation claims under § 3730(h). We are unpersuaded that Congress's addition of language referring to "the date on which the violation of section 3729 is committed" was intended to exclude § 3730(h) from the ambit of § 3731(b)(1), and that the consequences of the resulting statutory scheme are not absurd, but are in keeping with the FCA's purpose.

The dissent, like the Appellees, argues that the text of § 3731(b)(1) "could not be more plain. The six-year period is tied to a 'violation of section 3729' and nothing else." *Post* at 20. As explored below, however, this assertion is demonstrably inaccurate. Section 3731(b) *could* have provided that a "civil [**11] action under section 3730(a) or (b) may not be brought more than six years from the date the violation of § 3729 is committed." This Congress did not do. Despite its Herculean effort, the dissent cannot disguise the fact that it is asking us to ignore what Congress expressly says: that an action under § 3730(h) protesting retaliation is "[a] civil action under § 3730."

A.

The threshold inquiry when interpreting the text of a statute is whether the language at issue "has a plain and unambiguous meaning with regard to the particular dispute in the case," for if the language is unambiguous and the "statutory scheme is coherent and consistent," no further inquiry is required. *Robinson*, 519 U.S. at 340. Indeed, "there is, of course, no more persuasive evidence of the purpose of

a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940); *see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980) ("Absent a clearly expressed legislative intention to the contrary, that [**12] language must ordinarily be regarded as conclusive."). A term in a section is ambiguous only if, when considered in the larger context of the statute as a whole, it is amenable to more than one reasonable interpretation. *Engle*, 464 U.S. at 217. n6

n6 The dissent draws on two additional canons of statutory construction that we find to be inapplicable to this situation. The first is that "'when Congress alters the wording of a statute, we must presume Congress intended a change in the law.'" *Post* at 21 (quoting *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). However, the authority cited by Lackey, *Brewster v. Gage*, 280 U.S. 327, 337, 74 L. Ed. 457, 50 S. Ct. 115 (1930), makes clear that this doctrine is relevant when Congress uses language "so differing from that used in the earlier act" that it could not but demonstrate Congress's intent to work a change in the law. The dissent's reliance on *Lackey* is circular, as the few newly added words on which it is predicated are so

equivocal that we must discern Congress's intent from the remainder of the section and its context, as we have attempted to below; the simple fact of revision does not demonstrate intent, the text does. *See United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997) (finding the amended language of a statute to be "inconclusive" as to Congress's intent and analyzing the statute based on its plain language and legislative purpose).

The second is the canon "*expressio unius est exclusio alterius*"; that the explicit inclusion of one or more of an obvious set signals Congress's intent to exclude the remainder of that set. *See, e. g., United States v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002). As the dissent acknowledges, however, this canon is less a directive than a guide, *id.*, and in this instance the doctrine appears to be of dubious use. *Cf. Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81-84, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002) (identifying "statutory language suggesting exclusiveness" and an "established series ...from which Congress appears to have made a deliberate choice" as two requirements that must be met in order to justify application of

the "*expressio unius*" doctrine, neither of which are clearly present in the amended FCA).

[*251] B.

Applying these principles to sections 3730(h) and 3731(b), we conclude that § 3731(b)(1) plainly applies to retaliation claims under § 3730(h). As noted above, the text of § 3731(b) does not exclude § 3730(h). Rather, the language of § 3730(b) states broadly that it applies to "[a] civil action under section 3730." § 3730(b). Because Congress elected not to modify this language in 1986 while adding a third cause of action to § 3730, we conclude that Congress intended § 3731(b) to continue to apply to all actions under § 3730, including the newly added cause of action for retaliation.

In contrast, we find the Appellees' competing interpretation of § 3731(b)(1) to be unpersuasive, and for reasons in addition to the fact that it requires the eliding of a provision to which the language would otherwise apply. The Appellees point to the differences in the provisions of § 3730 to which the six year limitations period of § 3731(b)(1) appears to apply. The Appellees argue that § 3730(a), involving an action by the Attorney General, and § 3730(b), authorizing actions by individuals, are based entirely on violations of § 3729, whereas retaliation claims under § 3730(h) [**14] are not. They reason that because § 3731(b)(1) begins the limitations period on the "date on

which the violation of § 3729 is committed," Congress cannot have intended § 3731(b)(1) to include § 3730(h).

This interpretation of the FCA is artificial, however, as § 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly. By its terms, § 3730(h) protects any "lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section." Id.* (emphasis added). Because an action under § 3730 will not lie absent an alleged violation of § 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under § 3730. *See Neal*, 33 F.3d at 865 (noting the "simplicity of administration" afforded by the approach codified in § 3731(b)(1)). Indeed, as noted by Judge Easterbrook, "it is easier to determine the date of a false claim than to pin down the time of retaliatory acts; the claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication. [**15] "*Id.* Rather than signaling by implication Congress's intent to exclude retaliation claims from § 3731(b)(1), the amended text of § 3731(b)(1) simply directs that the limitations period for retaliation claims under the FCA begins when the violation of § 3729, to which such violations of § 3730(h) must be tethered, n7 is found to have occurred.

> n7 Although we believe this fact to be self-evident, the dissent contends that the filing of a false claim in violation of § 3729 and a retaliatory discharge actionable under § 3730(h) are "independent" events, *post* at 18, an assertion we find puzzling. If an employee's termination is "independent" of a violation of § 3729 and the employee's decision to report it, at the very least, it would not be retaliatory. Alternatively, if the termination could fairly be described as "retaliatory," but could not be tied to the reporting of a violation of § 3729, it would be actionable not under the FCA and § 3730(h) but under Title VII or some other statute prohibiting employment discrimination. The events that trigger the statute of limitations may precede the final event that gives rise to an action for retaliation, *post* at 20, but that fact does not render the events "independent" of one another.

[**16] [*252] C.

Even if it were unclear whether Congress intended the language of § 3731(b)(1) to apply to actions under § 3730(h), the review of the legislative history required by that ambiguity reinforces the conclusion that the section applies to retaliation claims under the FCA. In discussing the provisions created by the 1986 amendments, the legislative history discusses "a new section 3734 under the False Claims Act to provide 'whistleblower' protection." S. Rep. at 34, *reprinted in* 1986 U.S.C.C.A.N. at 5299. This new section

was to "provide[] 'make whole' relief" for anyone discharged for engaging in activity protected under the Act, including anyone who is "'discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against.'" *Id.* However, no such completely new section was added. Instead, Congress added this provision to § 3730 as subparagraph (h). *See* False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157-58 (1986). n8 Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] [**17] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. *See Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989). Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply. *Cf. Russello v. United States*, 464 U.S. 16, 23-24, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). n9

n8 In the version of the amendments proposed by the House of Representatives, the retaliation provision was to be included as § 3730(g). *See* H.R. Rep. No. 99-660, at 12-14 (1986).

n9 We note that *Lujan* did not consider this legislative history in concluding that "*in the absence of some meaningful indication to the contrary*, we must therefore presume that, in amending section 3731(b) ... Congress did not intend that the statute apply to section 3730(h)." 162 F.3d at 1035 (emphasis added).

[**18] IV.

As an alternative basis to facial ambiguity for exempting Wilson's retaliation claim from the six-year limitations period of the FCA, the Appellees press the district court's conclusion that a literal application of the text of § 3731(b)(1) to retaliation claims under § 3730(h) would lead to absurd results. The Appellees posit two variations on this theme. The first arises from the fact that § 3731(b)(1) effectively begins the limitations period for retaliation claims before the act of retaliation occurs. The second arises from the Appellees' reading the term "violation" in § 3731(b)(1) to require an actual and substantiated violation of § 3729. We consider in turn whether either of these hypothetical situations constitutes an absurd result. n10

n10 The dissent describes this discussion as an attempt to advance "a number of policy rationales to support [our] result." Post at 18. The dissent neglects to point out that these purported "policy rationales" are merely an exploration of the consequences that flow

> directly from the text of the FCA itself, and are offered to demonstrate only that the statute means precisely what the statute says. In contrast, the dissent offers a number of policy rationales for its competing construction of § 3731(b), which considers only a part of the language added by Congress in 1986. More importantly, the dissent's dissertation fails to demonstrate that any of the consequences identified here are absurd. Certainly, the arrangement that follows from the plain text of the § 3731(b) is a departure from the limitations periods generally applicable to claims of retaliation, and the dissent points out the merit of the usual scheme. Nevertheless, when Congress's intent to endorse the benefits and consequences of one statutory scheme over another is clear from the text of the statute, as we conclude it is here, "the wisdom of Congress' action ...is not within our province to second guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222, 154 L. Ed. 2d 683, 123 S. Ct. 769 (2003).

To the extent the dissent cannot fathom why "the majority goes to such extraordinary lengths" to resist his views, *post* at 23, we can only proffer our obligation to apply Congress's language as written. Congress has the discretion to designate the starting point for the running of the statute of

limitations period it imposes. When it does so, as it has here, we do not feel it appropriate to substitute one we prefer. *Eldred*, 537 U.S. at 222. [**19] [*253]

A.

In support of their argument that § 3731(b)(1) may, in certain circumstances, foreclose a claim for retaliation before it accrues, the Appellees offer two specific examples. First, an employer may, if the whistle-blowing employee has reported a false claim that the employer submitted several years earlier, elect to wait-out the limitations period before terminating or otherwise retaliating against that employee. Or, an employee may report a § 3729 violation that is so old that the limitations period expires shortly after the employee reports the violation, effectively leaving the employee unprotected. However, neither result is necessarily absurd.

As a threshold matter, we note that statutes of repose have the same effect. Yet we find no absurdity in Congress's prerogative to limit the rights it creates in this manner. "Statutes of repose, increasingly common in tort cases, have the potential to block litigation before the tort occurs." *Neal*, 33 F.3d at 865. Assuming that this is indeed "what Congress had intended to accomplish by way of the limitation period contained in the False Claims Act, 'that would not condemn [those provisions] as absurd. It would [**20] show only that Congress had opted for simplicity of administration.'" *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 (E.D. Va. 2001) (alteration in original) (quoting *Neal*, 33 F.3d at 865).

Second, courts have recognized that there is, as a practical matter, a close temporal relationship between a protected act and the retaliatory conduct based on it. *See Neal*, 33 F.3d at 865-66; *Storey*, 207 F. Supp. 2d at 446 (citing *Grand ex rel. United States v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1986)). As a result, there would be few instances in which several years would pass between the violation, the protected conduct, and the retaliatory act. Additionally, the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the Appellees would occur. Moreover, the six years provided from the date of the violation should be sufficient to encompass the protected act and the retaliation, lest they both face challenges for attenuation and staleness.

Even assuming the hypothetical circumstances described by the Appellees occur, [**21] the doctrines of equitable tolling or equitable estoppel may provide relief. *Neal*, 33 F.3d at 866. These doctrines are "based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff from filing his or her claim on time." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). In those instances where the employer has delayed a retaliatory termination until the statute of limitations has run, the employee's failure to file in timely fashion may fairly be [*254] described as "the consequence ...of a deliberate design by the employer," such that the employer could be barred from raising the

limitations period as a defense under the doctrine of equitable estoppel. *Id.* (internal quotation omitted). n11 Ultimately, the speculation that a plain-text application of the FCA's amended language *could* yield an absurd result in a limited category of hypothetical cases stands in stark contrast to the decidedly unfavorable result that interpretation would have on the retaliation claim at issue here. The result which would flow from the interpretation advanced by the Appellees [**22] and the dissent would comport with neither Congress's stated intent in amending the FCA ". . . to encourage any individual knowing of Government fraud to bring that information forward," S. Rep. at 1-2, *reprinted in* U.S.C.C.A.N. at 5267, nor with the liberal interpretation to be accorded to remedial legislation, *Neal*, 33 F.3d at 862.

n11 As an additional matter, we note that none of the various potentially absurd outcomes identified by the Appellees' brief would arise under the facts presented in this case. This too counsels against adopting the Appellees' construction of the FCA here. This court's function in interpreting a statute is "to determine whether the language at issue has a plain and unambiguous meaning with regard *to the particular dispute in the case." Robinson*, 519 U.S. at 340 (emphasis added). While we are not convinced that any of the consequences advanced by the Appellees as a result of applying § 3731(b)(1) to retaliation

> claims under the Act are absurd, the fact that none of these consequences arise in the context of Wilson's retaliation claim reinforces our conclusion that these arguments in favor of applying the North Carolina statute should not be dispositive on appeal.

[**23] B.

Nor are we convinced by the Appellees' contention that, if courts must look to when "the violation of section 3729 is committed," applying § 3731(b)(1) to a retaliation claim under the Act would have the absurd result of withholding retaliation protection until an action under § 3730(a) or (b) proves that such a violation actually occurred. While subparagraph 1 of § 3731(b), when read in isolation, is susceptible to a reading that begins the limitations period with a proven violation rather than an alleged violation, *see Ackley*, 110 F. Supp. 2d at 402, we are not persuaded this construction is appropriate, particularly when read in the broader context of the FCA.

As a threshold matter, the Appellees' construction of "violation," even when read in isolation, arguably reduces § 3731(b)(1) to surplusage. If the term "violation" in § 3731(b)(1) is read to require a judicially substantiated violation of § 3729 as the Appellees contend, that provision could not serve as the limitations period for the very actions under § 3730(a) or § 3730(b) necessary to prove such a violation. So read, § 3730(b)(1) would not apply to any action under § 3730. Expanding the [**24] inquiry to include

other provisions of the FCA reinforces the conclusion that the Appellees' reading of "violation" is inappropriate. In *Neal*, the Seventh Circuit concluded that § 3730(h) applied to retaliation claims even in the absence of a judicially vindicated violation of § 3729. *See* 33 F.3d at 863-64. It did so in light of the breadth of activities protected by § 3730(n), which includes supplying "information during the 'investigation' of a suit 'to be filed' in the future." *Id.* (quoting § 3730(h)). More importantly, *Neal* also concluded based on this language that it was inappropriate to read the term "violation" as "a condition subsequent, necessary to perfect the protection for activities that were sheltered at the moment of their commission." *Id.* at 864. Rather, it should be assessed "according to [*255] how things stood at the time of the investigatory activity." *Id.*

We note too that the Appellees' interpretation of "violation" is equally incompatible with the fact that retaliation provisions do not generally require the plaintiff to engage in activity that is actually protected. An objectively reasonable "good faith" belief [**25] that the activity is protected is sufficient to satisfy the prima facie requirement for retaliation claims. *Cf. Peters v. Jenney*, 327 F.3d 307, 321 (4th Cir. 2003) (noting that in order to make out a prima facie claim of retaliation under the Civil Rights Act of 1964, a plaintiff need only demonstrate a subjective "good faith" belief that the activity she engaged in was protected that is objectively reasonable, rather than proving conclusively that the activity was protected as a matter of law). In light of the

tension created by the Appellees' narrow definition of violation when considered in light of the other language in § 3731(b) and the FCA as a whole, we decline to apply that construction, as "its invocation would result in a construction of the statute which ...is at odds with the language of the section in question and the pattern of the statute taken as a whole." *SEC v. Sloan*, 436 U.S. 103, 121, 56 L. Ed. 2d 148, 98 S. Ct. 1702 (1978).

V.

Finally, we are not convinced that applying § 3731(b)(1) to Wilson's retaliation claim would yield a result that is at odds with Congress's intent in amending the FCA. To the contrary, we find the purposes of the FCA [**26] are well-served by application of § 3731(b)(1) to retaliation actions under § 3730(h), for three reasons. First, as the Supreme Court recently noted, one of the intended effects of Congress's 1986 amendments to the FCA was to "enhance[] the incentives for relators to bring suit." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133, 155 L. Ed. 2d 247, 123 S. Ct. 1239 (2003). Significantly, we note that recourse to the generally shorter limitations periods provided by state law inherently affords employees less protection than the six-year limitations period of the FCA, as Karen Wilson's experience attests. While North Carolina's statute of limitations for wrongful discharge actions is three years, some state retaliation statutes provide for limitations periods as short as 180 days. *See, e. g.*, Tex. Health & Safety Code Ann. §§ 161.132, 161.134 (Vernon 2002) (imposing 180-day

period in which to file action alleging retaliation against health-care worker for reporting "conduct that is or might be illegal, unprofessional, or unethical and that relates to the operation of the facility"); *Grand*, 811 F. Supp. at 336 n. 2 [**27] (noting terminating employer's contention that Ohio's 180-day limitations period governs retaliation claims under the FCA should § 3731(b)(1) not apply). Such an abbreviated limitations period may be too short for an employee to adequately marshal the evidence necessary to support a claim that her termination was predicated on protected activity. *Cf. Reed*, 488 U.S. at 323 n. 2, 324, 326 (suggesting that a six-month limitations period provides insufficient time for an aggrieved union member to "identify[ ]the injury, decide in the first place to bring suit against and thereby antagonize union leadership, and find[] an attorney"). Applying state law in lieu of the FCA's limitations period would undermine the very protection that Congress intended to confer by enacting § 3730(h). The dissent does not explain how the purposes of the FCA are served by subjecting either the present or future relators who seek to vindicate federal interests to the vagaries of a patch-work of state limitations periods, some as short as six months.

[*256]Second, the uncertainty inherent in the process of identifying which of several potentially applicable statutes in any given state is "most [**28] analogous" would further undermine the protection afforded by § 3730(h). To make this determination, courts must first "characterize the essence" of the plaintiff's claim, then decide which state

statute provides "the most appropriate limiting principle." *Wilson v. Garcia*, 471 U.S. 261, 268, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). While we do not doubt the ability of the district courts to follow these considerations to their logical conclusion, we note the frequency with which states have enacted "multiple statutes of limitations for personal injury actions," and the difficulties that can arise in selecting which is most analogous. *See Owens v. Okure*, 488 U.S. 235, 241, 243-44, 102 L. Ed. 2d 594, 109 S. Ct. 573 & n.8, (1989) (noting that in "States with multiple statutes of limitations for personal injury actions," it may be difficult to ascertain which is most analogous, and that courts of appeals had devised two different approaches when resolving this issue in § 1983 actions). The collateral litigation necessary to resolve this issue would exacerbate any uncertainty as to the time available for filing a retaliation claim, and thereby reduce the employee's incentive to report [**29] a violation of § 3729. *Cf. Reed*, 488 U.S. at 326 ("Time-consuming litigation as to the collateral question of the appropriate statute of limitations for a § 101 claim ...creates uncertainty as to the time available for filing, and it would not be surprising if the prospect of perhaps prolonged litigation against the union before ever the merits are reached were to have a deterrent effect on would-be § 101(a)(2) plaintiffs.").

Third, the Appellees overlook the additional uncertainty that choice-of-law issues would create for employees in deciding whether to report violations of § 3729. Reference to state statutes of limitations may require district courts to

address choice of law issues in determining which state's law it must look to before selecting the appropriate state statute. *Cf. Ackley*, 110 F. Supp. 2d at 402-03 & n. 7 (disagreeing with defendant's argument that Maryland's *lex loci delicti* choice-of-law rule applied and required recourse to New York's one-year limitations period, and collecting cases for and against proposition that the most analogous statute is to be identified from the forum state's code, rather than following an application [**30] of the forum state's choice-of-law rules). Forcing an employee to confront complicated choice-of-law issues in deciding what protection, if any, the FCA will provide should she disclose a violation of § 3729 further dilutes the incentive to report such violations that Congress intended to create by adding § 3730(h). The importance of this consideration is underscored by the legislative history of the 1986 amendments, which note that much of the fraud against the government is committed by large contractors with a presence in several states. *See* S. Rep. at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Hence, recourse to a single, consistent statute of limitations would be consonant with the purposes of the FCA.

VI.

For the foregoing reasons, we conclude that § 3731(b)(1) provides the limitations period for retaliation actions under § 3730(h). Accordingly, we vacate the district court's orders granting the Appellees' motion to dismiss Wilson's retaliation claim as time-barred as well as denying reconsideration of

that dismissal, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

[*257] WILKINSON, Circuit Judge, dissenting: [**31]

I thank Judge Duncan for her fine opinion. This is not an easy case, and there exists a square conflict between the Ninth Circuit, *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035 (9th Cir. 1998) (state statute of limitations for wrongful discharge applies to anti-retaliation claims under section 3730(h)), and the Seventh Circuit, *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 66 (7th Cir. 1994) (six-year statute of limitations in section 3731(b) applies to claims under section 3730(h)). In my judgment, the *Lujan* court advances the better interpretation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). The sole issue in this interlocutory appeal is whether the district court correctly held that North Carolina's three-year statute of limitations for wrongful discharge applies to complaints of retaliatory conduct brought under section 3730(h) of the FCA. reasons expressed by both *Lujan* and the district court, I agree that the three-year limitations period applies.

My colleagues, by contrast, hold that under section 3731(b) an employer's submission of false claims commences a six-year statute [**32] of limitations for the independent event of retaliation against an employee. The majority thus introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts

themselves. The majority offers a number of policy rationales to support its result. But these rationales are found nowhere in the text of the FCA and rest on scant support in the legislative history.

The majority suggests its approach to the statute has this or that advantage, but I do not think it acknowledges adequately all the debits of its departure from the statutory text. Its approach fails to give employees adequate notice concerning when the statute of limitations begins. Worse still, it may preclude challenges to retaliatory acts under section 3730(h) before that cause of action has even accrued. The majority also undermines the entire basis for a statute of limitations by counseling judges to exercise equitable tolling powers to recognize claims whenever the drawbacks of its interpretation of the FCA become too apparent to ignore.

And, of course, six years is a long time. Deaths, departures, and forgetfulness can [**33] occur in such a period, and the relevant evidence has often faded. That is not to say that Congress could not mandate such a period, only that it has not chosen a time frame so far in excess of analogous state provisions.

So I believe the majority is mistaken. In the absence of an express federal statute of limitations, the district court properly applied the statute of limitations for the most closely analogous state action of wrongful discharge. *See Reed v. United Transportation Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989). North Carolina's three-year statute of limitations for wrongful discharge

affords a whistle-blowing employee both adequate notice and a reasonable period of time to file anti-retaliation claims.

I.

A.

The starting point for our inquiry must be the text of the statute. The FCA's sole statute of limitations provision states:

> (b) A civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or [*258] (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United [**34] States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). Since anti-retaliation claims under section 3730(h) are part of section 3730, my colleagues contend a plain reading suggests that the statute of limitations applies. But "the answer is not so simple." *Lujan*, 162 F.3d at 1034.

Unfortunately, the majority's purported plain language interpretation lops off half the statute. It overlooks the fact that both prongs of the statute of limitations turn explicitly on events independent from any alleged retaliatory actions.

This fact alone suggests that the statute of limitations does not apply to anti-retaliation claims.

The first statutory limitations period begins with the occurrence of a section 3729 violation. 31 U.S.C. § 3731(b)(1). The text of this provision could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of [**35] section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees. Indeed, an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations, which would leave this statute of limitations without a starting point. Retaliation by an employer may also occur more than six years after the employer committed the false claims violations, which would leave the employee without a cause of action. Therefore, it seems incongruous to say the least that an employee's ability to bring retaliatory claims should turn on when or whether the employer has submitted false claims to the government in violation of section 3729. *See United States ex rel. Ackley v. International Business Machines Corp.*, 110 F. Supp. 2d 395, 401-03 (D. Md. 2000).

The second statutory limitations provision also has nothing to do with anti-retaliation claims under section 3730(h). *See* 31 U.S.C. § 3731(b)(2). This alternative statute of limitations

[**36] commences on the date when federal officials charged with responsibility to act under the FCA knew or reasonably should have known material facts concerning the section 3730 claim. But this is a logical impossibility in the case of section 3730(h) claims. No United States official is responsible for anti-retaliation claims under section 3730(h), and no official can even file an anti-retaliation action on behalf of an affected employee. A whistle-blowing employee is the only individual empowered to bring challenges to retaliatory actions under section 3730(h). Therefore, it would seem impossible to link the statute of limitations for anti-retaliation claims to this provision.

In sum, applying either of the section 3731(b) limitations periods to section 3730(h) anti-retaliation actions is like cramming squares in circles. In neither language nor logic do they fit.

B.

Prior to 1986, section 3731(b) stated that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982). This pre-1986 [*259] provision clearly established that a six-year statute of limitations applied to all [**37] section 3730 claims.

If Congress had retained this language when it added anti-retaliation actions to the FCA, then our job would be simple. But Congress in 1986 chose to amend the FCA, and we must "presume that language added by amendment was not mere surplusage." *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975

(4th Cir. 1993). Congress introduced in 1986 a cause of action for retaliatory acts under section 3730(h). Simultaneously, Congress revised the statute of limitations provision under section 3731(b) in two significant ways.

First, Congress narrowed the applicability of the statute of limitations to "violations of section 3729." *See* 31 U.S.C. § 3731(b)(1). If Congress had intended that a six-year statute of limitations apply to section 3730(h) anti-retaliation actions, it would not have made an employer's false claims violations the thing that starts the statute running. Second, Congress would not have added the alternative provision that the statute of limitations for section 3730 runs three years after an official knew or reasonably should have known of facts material to the right of action. *See* 31 U.S.C. § 3731 [**38] (b)(2). Both of these changes mean that the statute of limitations applies only to section 3730 claims that concern the employer's false claims violations under section 3729 and not to challenges to retaliatory acts brought by an employee under section 3730(h). To decide otherwise suggests that this statutory change is meaningless and contravenes the well-established rule that "when Congress alters the wording of a statute, we must presume Congress intended a change in the law." *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997).

The majority asserts that "§ 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly." Maj. op. at 9. This is an implicit argument, and we do not interpret cross-references in statutes in this fashion. We must presume that when Congress incorporates statutory cross-references, it is

careful in laying out the provisions to which the references occur. Here the references in section 3731(b) include section 3729, but do not include section 3730(h). When Congress includes one provision, it is safe to assume that it excludes others, absent evidence to the contrary. *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983). [**39] While this principle may not serve as an infallible guide to statutory interpretation, it surely applies here.

My colleagues also point to a piece of legislative history, which indicated the Senate's initial intent to place whistle-blower protections under a separate section of the FCA. *See* Maj. op. at 10-11. The majority claims that the ultimate inclusion of challenges to retaliatory acts under section 3730(h) suggests that Congress somehow decided that section 3731(b) would establish the statute of limitations for these claims. This interpretation rests on a negative inference, and nothing affirmatively suggests that Congress added anti-retaliation claims to section 3730 with this purpose in mind.

In an effort to explain its conclusion, the majority states that Congress was, in effect, enacting a statute of repose. Maj. op. at 12. But, of course, Congress was doing nothing of the sort. Indeed, it is startling for the majority to suggest that Congress was bent, in the FCA no less, on establishing "repose" for employers who first defrauded the government and then moved against the very persons who brought that

fraud to light. Section 3731(b) is self-evidently a statute of limitations. [**40]

The majority implies that when it picked the point to start the limitations period, [*260] Congress either did not know the difference between sections 3729 and 3730, or that it inadvertently neglected to include a reference to an immediately adjoining section of the statute. There is another explanation, however - namely that Congress did not include a reference to section 3730 because it did not wish to include such a reference. The actual statutory changes that Congress did enact underscore the point that Congress did not intend for section 3731(b) to apply to section 3730(h) claims. As the *Lujan* court held, "in the absence of some meaningful indication to the contrary, we must therefore presume that, in amending section 3731(b) so that the limitation runs only from the date of a violation of section 3729, Congress did not intend that the statute apply to section 3730(h)." *Lujan*, 162 F.3d at 1035.

C.

The majority's interpretation is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts. *See, e. g.*, N.C. Gen. Stat. § 1-52(5)(2003); Va. Code Ann. § 8.01-248 [**41] (2003); W. Va. Code § 55-2-12 (2003). By holding that the statute of limitations for anti-retaliation actions is set in motion by some independent event, rather than by the retaliatory acts themselves, the majority denies employees adequate notice of when they can bring a claim. Indeed, the

majority's interpretation may fail to provide any notice *at all* to employees as to when their claims may commence or be foreclosed. There is a reason that statutes of limitations for anti-retaliation actions begin with the alleged retaliatory event. Because the retaliation bears adversely on the affected employee, it serves as the best possible notice that the employee may henceforth seek redress.

This same reason suggests why Congress did not mandate a six-year statute of limitations for section 3730(h) actions. Since false claims themselves are acts of deception, it makes sense for a longer statute of limitations to provide time to uproot the deception. But this is simply not a concern for employees under section 3730(h) who will feel the sting of the retaliatory actions at the moment they occur.

The matter seems almost second-nature. Statutes of limitations for [**42] personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act. In short, I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

The majority's interpretation also casts uncertainty over the ability of affected employees to raise claims. For example, under its interpretation a whistle-blowing employee could report on his employer's submission of a false claim some five years or more after the claims were submitted, yet be

fired with apparent impunity just months later. The problem is thus that the existence of an independent trigger for the statute of limitations narrows the window of opportunity for affected employees to make challenges to retaliatory actions under section 3730(h). My colleagues summon judges to exercise their equitable tolling powers in such instances to override the limitations period in the interests of justice. But the idea that a statute of limitations could expire even before the [**43] cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace. Reliance on equitable tolling in these circumstances undermines the value of having a statute [*261] of limitations in the first place and vests courts with unpredictable discretion with regard to late claims. The uncertainties of equitable tolling may make it more difficult for discharged whistle-blowers to secure legal representation. Lawyers may be reluctant to take on late challenges to retaliatory actions if there is only a chance that judges will exercise equitable tolling powers to recognize them.

The majority chides the dissent for manifesting a concern about future employees and not the employee in this case. But efforts to rescue a present plaintiff cannot justify creating problems for future plaintiffs that Congress did not intend. My colleagues respond to these problems with various policy pronouncements. The majority posits that Congress chose to have section 3731(b) apply to anti-retaliation actions under section 3730(h) to further "simplicity of administration." Maj. op. at 9-10. Nowhere in

the statute or legislative history is Congress' desire for simplicity of administration [**44] articulated. Simplicity of administration is certainly not furthered by the majority's exhortation for judges to use equitable tolling. Nor is simplicity of administration advanced by the majority's discussion of what actually constitutes a "violation" of section 3729. Maj. op. at 14-15. In this connection, we are told we need not await a judicially determined violation, but what other than that might suffice to set the statute running is left unclear. And to have all this in the course of a discussion on administrative ease and convenience underscores the fact that the majority's interpretation will present us with anything but.

In support of its result, the majority claims there is generally a close temporal relationship between protected acts and retaliatory conduct, and that it is easier to know when fraud against the government occurs than when retaliatory actions occur. Maj. op. at 9. These arguments are speculative. Whether false claims or retaliatory actions are easier to identify will depend on which claim or which action one happens to be talking about. And as for the "close temporal relationship between a protected act and the retaliatory conduct based on it," Maj. op. [**45] at 13, an employer, and especially one aware of the majority's limitations rule, could resolve not to "get mad," but in the longer run "to get even." The majority finally argues that "the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the Appellees

would occur." Maj. op. at 13. This too is hardly self-evident, because the discovery of false claims, predicated on deceptive practices, may not occur until late in the day. In all events, these sorts of judgments are legislative, not judicial in nature, and they afford no basis for ignoring the fact that Congress pegged the six-year limitations period to violations of section 3729, not section 3730(h), in the statute itself.

II.

"Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, 'we have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'" *Reed*, 488 U.S. at 323 (quoting *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983)). [**46] Since Congress enacted section 3730(h), but provided no statute of limitations, we must apply state law where the retaliatory actions took place. The North Carolina statute concerning wrongful discharge is the most analogous provision for a retaliatory discharge under the FCA. *See Renegar v.* [*262] *R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 549 S.E. 2d 227, 229 (N.C. Ct. App. 2001). The three-year statute of discharge should therefore apply and begin at the time the discharge in this case took place. *See* N.C. Gen. Stat. § 1-52(5) (2003). The challenge to the retaliatory action here occurs almost four years after this point and should thus be time-barred.

In applying state law, "'[i]t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national polices.'" *Reed*, 488 U.S. at 324 (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367, 53 L. Ed. 2d 402, 97 S. Ct. 2447 (1977)). Application of the state statute of limitations in this context would not "frustrate or interfere with the implementation of national policies" or "be at [**47] odds with the purpose or operation of federal substantive law." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995) (internal quotations and citations omitted). In fact, this standard would make it easier for affected employees to challenge retaliatory actions, because they would at least know when they could do so. By contrast, the majority's interpretation leaves in the dark plaintiffs who seek to bring the dealings of those who defraud the government to light.

The majority points out that state statutes of limitations vary in duration and that a few states, such as Ohio, have a statute of limitations period for wrongful discharge as low as 180 days. But we are not thereby entitled to abandon the statutory text whenever a federal court perceives that a state steps "out of line." It is altogether plausible that Congress chose to respect both the diverse views of states on the length of limitations periods for wrongful discharge and the consensus view of states that such periods, whatever their length, should run from the date of the retaliatory acts themselves. Of course, Congress could provide a uniform time-period for

these actions anytime [**48] it chooses to do so. But federal uniformity has never been thought an indispensable feature of federal law. *See, e. g.*, Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. Other federal statutes, such as the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, have required courts to identify the most analogous state causes of action and to apply state statutes of limitations to federal claims. *See Owens v. Okure*, 488 U.S. 235, 239-40, 245-48, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989) (section 1983 actions are governed by state general or residual personal injury statutes of limitations); *see also Reed*, 488 U.S. at 326-27 (claims under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2), prohibiting unions from interfering with members' right to free speech as to union matters, are governed by state general or residual personal injury statutes).

Any difficulties with applying state law suffer in comparison to the difficulties which the majority has created. In some cases, the majority's new rule may be clear, but in others it will cause uncertainty, [**49] and in still others it will discourage or prevent deserving whistle-blowers from having their day in court. Congress may deem it necessary and appropriate to extend the time frame for anti-retaliation claims well beyond those which individual states provide. But until it does so, I would adhere to what I respectfully believe is its presently expressed intent.

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1122
(CA-01-19-2)

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR;

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

ORDER

The court amends its opinior filed April 29, 2004, as follows:

On page 8, footnote 6, in line 1 of paragraph 1 and lines 1 and 5 of paragraph2: the word "canons" replaces "cannons."

For the Court - By Direction,

/s/ Patricia S. Connor
Clerk

ORDER (AMENDING PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT), DATED MAY 25, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1122
(CA-01-19-2)

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR;

ORDER (AMENDING PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT), DATED MAY 25, 2004

JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

ORDER

The court further amends its opinion filed April 29, 2004, and amended May 10, 2004, as follows:

On page 11, footnote 10, line 2, "*Post* at 18." is added after the first sentence. On page 12, line 1 of the footnote, "Certainly, arrangement that follows" is corrected to read "Certainly, the arrangement that follows."

For the Court - By Direction,
/s/ Patricia S. Connor
Clerk

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

CIVIL NO. 2:01CV19

UNITED STATES *EX REL.*, KAREN T. WILSON
Plaintiffs,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; RICHARD GREENE; CHERIE GREENE; WILLIAM TIMPSON; RICKY STILES; KEITH ORR; BETTY JEAN ORR; RAYMOND WILLIAMS; DALE WIGGINS; JOYCE LANE; GERALD PHILLIPS; ALLEN DEHART; JIMMY ORR; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; BILL TIPTON; LLOYD KISSELBURG; CI. B. NEWTON; EDDIE WOOD; TED ORR; BERNICE ORR; JOHN DOE AND JOHN DOE

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

CORPORATIONS; and GOVERNMENTAL ENTITIES 1-99,

Defendants.

MEMORANDUM OF OPINION

THIS MATTER is before the Court on objections filed by Relator Karen T. Wilson (Wilson) to the memorandum and Recommendations of the United States Magistrate Judge Max O. Cogburn, Jr. Defendants Graham County Board of County Commissioners (the Graham County Board), Raymond Williams (Williams), Dale Wiggins (Wiggins), and Lynn Cody (Cody) (collectively "responding Defendants") have filed timely responses to Wilson's objections. Pursuant to standing orders of designation and 28 U.S.C. § 636, this Court referred the following motions to the Magistrate Judge for a recommendation as to disposition: (1) motion to dismiss filed by the Graham County Board, Williams, Wiggins, and Cody; (2) motions to dismiss and for a more definite statement filed b Defendants Cherokee county Soil & Water Conservation District (the Cherokee County District), Bill Tipton (Tipton), Eddie Wood (Wood), and C. B. Newton (Newton); (3) motion to dismiss filed by Defendants Cherokee County Board of County Commissioners (the Cherokee County Board), Charles Laney (Laney), Eugene Morrow (Morrow), and George Postell (Postell); (4) motion to dismiss of Defendants Graham County Soil & Water Conservation District (the

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

Graham County District), Gerald Phillips (Phillips), Allen Dehart (Dehart), Jimmy Orr, and Lloyd Millsaps (Millsaps); and (5) motion to amend the complaint filed by Wilson. The Magistrate Judge filed a recommendation that the motions to dismiss the action filed by the Cherokee County Board, the Cherokee County District, the Graham County Board, the Graham County District (collectively "the municipal governmental entities" or "the municipal entities"), and those individuals who serve on those municipal entities at the relevant times be granted in part; the motions to dismiss filed by the municipal entities and the individual Defendants, in their official capacities, be allowed on the grounds of municipal immunity from punitive damages. The Magistrate Judge further recommended that the motions to dismiss the Defendants in their individual capacities be denied.[1] The Magistrate Judge recommended that Wilson's motion to amend her complaint to comply with the requirements of F. R. Civ. P. 9(b) be granted.

The district court conducts a *de novo* review of those portions of a Magistrate Judge's Memorandum and

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[1] The Magistrate Judge noted that the real parties in interest were not the County Boards, but rather Graham County and Cherokee County. If this Court determined that the municipal entities were not found to be immune from punitive damages, the Magistrate Judge recommended allowing Wilson to amend her complaint to insert the counties themselves as Defendants in place of the Boards. The Magistrate Judge also recommended that these amendments would relate back to the date the original complaint was filed. The Court adopts these recommendations.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

Recommendation to which specific objections are filed. ***See* 28 U.S.C. § 636(b)**. This Court will not address general objections to the Magistrate Judge's final Recommendation. "A general objection...has the same effect as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless." ***Howard v Secretary of HH*, 932 F.2d 505, 509 (6th Cir. 1991)**. In this Circuit, *de novo* review is unnecessary "when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." ***Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982)**. Those parts of a Magistrate Judge's Memorandum and Recommendation to which no specific objections are filed are given careful review. ***Id.***

Wilson timely filed two specific objections to the Magistrate Judge's recommendations. First, Wilson objects to the determination that the False Claims Act (FCA), 31 U.S.C § 3729, *et seq.*, did not abrogate municipal immunity on the grounds that the Magistrate Judge failed to give the proper deference to the position taken by the Department of Justice as *amicus curiae* under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). She also objects to the Magistrate Judge's conclusion that the Fourth Circuit would not find a line of cases in other Circuits – holding that F.R.Civ.P. 9(b)'s pleading requirements are loosened in similar situations – to be persuasive authority. For the reasons stated herein, the motions to dismiss are granted in part and denied in part.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

I. FACTUAL AND PROCEDURAL HISTORY

The Plaintiff Wilson, a former employee of the Graham County District, alleges that the Defendants, in various combinations, submitted false claims to three different programs, *i.e.*, "EWP-216," a federal Emergency Watershed Protection program implemented in the wake of a 1995 storm and the federally funded North Carolina Cost Share and Farm Services Agency programs. She claims some of the Defendants submitted claims for work that was never done, submitted claims for work that was improperly bid, submitted claims for materials that were never used, or failed to report proceeds of timber sales where the timber was removed as a part of the program. She further alleges that other Defendants assisted in procuring funds based on these claims and in covering up the malfeasance. Wilson alleges that she attempted to bring these charges to light, and her employer and co-workers harassed her in retaliation, resulting in her constructive discharge. As such, she asserts two causes of action, a *qui tam* claim for violation of § 3279 and a claim of FCA retaliation und § 3730(h).

Wilson filed her sealed complaint on January 25, 2001. Pursuant to 31 U.S.C. § 3720(a)(4), the United States filed Notice of Election to Decline Intervention on July 23, 2001. After service of process was had on Defendants, the last of the instant motions was filed on January 22, 2002; after a hearing held February 20, 2002, the Magistrate Judge filed his Memorandum and Recommendation on March 25, 2002.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

II. STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to state a claim, the Court must "accept the factual allegations in the plaintiffs' complaint and must construe those facts in the light most favorable to the plaintiffs...[Dismissal may occur] only if it appears beyond doubt that the plaintiffs can prove n set of acts in support of their claim that would entitle them to relief." ***Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997); *Shepard's, Motions in Federal Court*, § .124, at 367 (2d ed. 1991).** "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if proven, will justify some form of relief." ***Id.*, § 5.123, at 366.** If "relief could be granted under any set of facts that could be proved consistent with the allegations," the motion must be denied. ***Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).** Conversely, if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. . .a claim must be dismissed." ***Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citing *Hishon, supra*).**

III. DISCUSSION

A. Municipal Immunity

Wilson's objection regarding municipal immunity is that, during the pendency of these motions, the Seventh Circuit Court of Appeals ruled on the same question, crating a split among the Circuits which have ruled on this issue to date.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

***See United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002) (finding no municipal immunity), mandate sayed, 282 F.3d 448, *petition for cert. filed*, 70 U.S.L.W. 3670 (Apr. 19, 2002); *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001) (finding municipal immunity), *cert. denied*, 122 S. Ct. 808 (Jan. 7, 2002); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002) (finding no municipal immunity)**. She argues the conflict among the Circuits provides this Court with a "strong indication" that the FCA is ambiguous on this issue and that the Court should defer to the interpretation of the FCA as set forth by the Justice Department in it *amicus curiae* brief. ***See Smiley v. Citibank* (South Dakota) N.A., 517 U.S. 735, 739 (1996)**.

In many instances of statutory ambiguity, courts are required to afford a level of deference to the interpretation of a statute by the relevant governmental agency. ***See, e.g., United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chervon U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore, supra*.** The responding Defendants are willing to concede that the Court should apply *Skidmore* deference. **Opposition of "Responding Defendants" at 1 ("although *Skidmore* analysis is entirely appropriate given the intra-circuit conflict . . .".)**. The Court, however, is not convinced that the Justice Department's position should be afforded deference in this situation.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

The level of deference courts afford to statutory interpretations by agencies of the Executive Branch attempting to resolve ambiguous language in a statue varies with the degree to which Congress has delegated the authority to implement a statute to an Executive agency. In the modern, regulatory federal bureaucracy, this is frequently an express of implied grant of authority to craft rules which bear the force of law. In this situation, courts grant agency determinations *Chevron* deference. ***See, Chevron, supra.***

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, *when it left ambiguity in a statute meant for implementation by an agency*, understood that the ambiguity would be resolved, first and foremost, by the agency, and desire the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

***Smiley*, 517 U.S. at 470-41 (emphasis added)**. The Supreme Court has recently restated this rule.

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress *delegated authority to the agency*

> *generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.* Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

***Mead Corp.*, 533 U.S. at 226-27 (emphasis added).**

Where Congress has not delegated such authority, courts must still give agency interpretations of regulatory or implementing statutes *Skidmore* deference.

> There is room at least to raise a *Skidmore* claim here, where the *regulatory scheme is highly detailed*, and Customs can bring the *benefit to specialized experience* to bear on the subtle questions in this case . .. .

***Id.*, at 235 (emphasis added).**

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

***Skidmore*, 323 U.S. at 140**. Even *Skidmore* deference, however, is limited to the situation where an agency issues

"opinion letters . . .policy statements, agency manuals, [or] enforcement guidelines" interpreting a statute which it was created to help implement or which has been especially charged to that agency given its unique expertise. ***Christensen v. Harris Co.*, 529 U.S. 576, 587 (2000).**

> But the [agency interpretation is] made in pursuance of official duty, *based upon more specialized experience and broader investigations and information that is likely to come to a judge in a particular case.* [It] determine[s] the policy which will guide applications for enforcement by injunction on behalf of the Government.

***Skidmore*, 323 U.S. at 139-40 (emphasis added).** "[D]eference is often appropriately give to an agency's interpretation of *its governmental statute*." ***Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (emphasis added).** These cases frequently involve agencies making determinations involving procedural aspects of their enforcement or regulatory duties. ***See, e.g., Christensen, supra; Meade Corp., supra; Admas v. S.E.C.*, 287 F.3d 183, 188-89 (D.C. Cir 2002) (giving *Skidmore* deference to the Administrative Conference's "Model Rules for Implementation of the Equal Access to Justice Act," 51 Fed.Reg. 16, 659 (May 6, 1986).**

The FCA does not establish a "highly detailed" "regulatory scheme." ***Mead Corp.* 533 U.S. at 235**. While

the Justice Department is granted the power to enforce the FCA, nothing about the Act, or the Justice Department, indicates any specialized information in the hands of the Justice Department which would give its interpretation of the FCA more weight. The Justice Department's power to enforce the FCA is more analogous to it power to enforce criminal statutes – such as the Controlled Substances Act, 21 U.S.C. § 801*et seq.* – than it is to the Equal Employment Opportunity Commission's power to establish procedures to enforce the Fair Labor Standards Act or the Environmental Protection Agency's power to establish regulations under the Clean Air Act. ***See, Christensen, supra; Chevron, supra.*** In fact, the FCA originally provided for both criminal and civil penalties until 1874 when the criminal provisions were re-codified. ***See,* U.S. REV. STAT. tit. 36, § 3490 (1875) (civil); *id.* tit. 70, § 5438 (criminal); *Untied States v. Southland Mgmt. Corp.*, 288 F.3d 665, 2002 WL 538779, *6 (5th Cir. 2002).** Particularly in regards to the issue at bar, there is not indication that the Justice Department possesses any "specialized experience" or "broader investigation or information" than is "likely to come to" this Court is this case. ***Skidmore, supra.*** If the Justice Department established guidelines for determining whether to proceed with an action itself or to leave a case under the control of a *qui tam* relator, those guidelines would certainly be entitled to deference. ***See,* 31 U.S.C. § 3730(b)(4).** The determination of whether the FCA has abrogated common law municipal immunity from punitive damages awards,

however, is one particularly suited to the decision making abilities of the federal courts. ***See, Chandler, supra; Garibaldi, supra; Dunleavy, supra; see also, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).** As such, the Court will grant the *amicus curiae* brief submitted by the Government no greater weight than the positions taken by the litigants.[2]

As such, the basis for Wilson's objection is inapplicable. Regardless, she has made a specific objection to the Magistrate Judge's conclusion regarding municipal immunity and this Court will review that conclusion *de novo.*

The Recommendation provides an excellent overview of the historical development of municipal immunity and the current status of municipal immunity under federal law. The Magistrate Judge concluded that "no punitive damages are allowed [against municipal entities] unless expressly authorized by statute." ***City of Newport*, 453 U.S. at 259 n.21; *Stevens*, 529 U.S. at 781 (holding States immune from FCA liability).** The issue is whether the FCA expressly authorizes punitive damages against municipal entitles.

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[2] It may be, however, that this is all the weight *Skidmore* deference requires. Under that decision, the Court affords agency opinions deference "proportional to its 'power to persuade.'" ***Meade Corp.*, 533 U.S. 235 (quoting *Skidmore*, 323 U.S. at 140).** The argument of any litigant is consistently given respect proportional to its persuasive power, in light of existing precedent.

Although it has undergone several amendments in the last 20 years, the essential liability provision of the FCA has been in place since 1863. ***Stevens*, 529 U.S. at 782-83**. The FCA provides that "[a]ny person" who, *inter alia*, "knowingly presents. . .to an officer or employee of the United States Government. . .a false or fraudulent claim for payment. . .is liable to United States Government." **31 U.S.C. § 3729(a); *Stevens, supra,* at 769**. Congress amended the damages provisions of the FCA in 1986 providing "for a civil penalty not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . .". ***Id.. Stevens*, at 785.** The previous version of the damages provision called for double damages and a $2,00 civil penalty, which the Supreme Court suggested were remedial rather than punitive damages. ***Stevens, supra* (citing *United States v. Bornstein*, 423 U.S. 303, 315 (1976))**. A successful *qui tam* relator under the FCA is entitled to receive up to 25 percent of the "proceeds of the action" if the Government does not intervene and up to 10 percent of those proceeds if the Government elects to intervene. **31 U.S.C § 3730(c)(1-2.**

The Magistrate Judge and the parties correctly agree that the ultimate question in deciding this issue is whether the term "person" in § 3729 includes municipal entitles. The term "person" is presumed to include municipal entities. ***See, Garibaldi*, 244 F.3d at 491 ("we cannot apply [] the presumption that the term person does not include the**

sovereign," because municipalities are distinct from States). This is precisely opposite to the presumption from which the *Stevens* court began in determining that the term "person" in § 3729 does not include the States and that they are, therefore, immune from liability under the FCA. ***Stevens*, 529 U.S. at 780 ("[w]e must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign")**. Under the *Stevens* decision, "the term 'person' has remained in the statute unchanged since 1863." ***Id.*, at 783 n.12.**

While the *Stevens* court found the legislative history of the 1986 amendments indicating the FCA would apply to the States was incorrect and therefore inapplicable in that decision, that conclusion does not apply to the legislative history as it regards municipalities. ***Id.*** The amendment did not alter the meaning of the term "person". ***Id.*** The determination that the legislative history is "erroneous and of questionable value" relied on by the Magistrate Judge and the Third Circuit in *Dunleavy* is based on the conclusion that the relevant portions of the legislative history had incorrectly determined that "person" was presumed to include the States. ***Id.; Dunleavy*, 279 F.3d at 225.** As it relates to whether the tem "person" includes municipalities, the legislative history is correct and supports the conclusion that Congress knew that "person" included municipalities when it made the 196 amendments. ***Stevens, supra.*** Based on the presumption that the term "person" includes municipal entitles, and the Supreme Court's finding that nothing in the

1986 amendments altered the meaning of that term, the Court concludes that the term "person" as used in § 3729 includes municipalities. As such, the 1988 amendments to the FCA expressly authorize punitive damages against municipal entities, and they are not immune from suit for a violation of § 3729. The motions to dismiss the complaint as *qui tam* relator based on a n assertion or municipal immunity must, therefore, be denied as to all Defendants.

B. Motion to Amend Complaint

1. Fraud Claims and Rule 9(b)

While the Magistrate Judge recommended Wilson's motion to amend complaint be granted, he did so based on the motion for a more definite statement filed by Defendants Cherokee County Board, Tipton, Wood, and Newton. These arguments were also raise by Defendants Graham County, Laney, Morrow, Wiggins, and Cody in their motions to dismiss. These Defendants argued Wilson's original complaint failed to satisfy the requirement of Rule 9(b) that "in all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularly." **Fed. R. Civ. P. 9(b)**. Although the Magistrate Judge concluded that the original complaint did not meet this requirement, he recommended allowing Wilson the opportunity to amend the complaint to bring it into compliance with the Rule. He also recommended allowing Wilson to amend her Complaint to name Cherokee County and Graham County as Defendants rather than the County Boa5rds and that those amendments would relate back to the date of filing of the original

complaint. Not Defendant has objected to this conclusion; and upon careful review, the Court finds it to be appropriate.

Wilson objects to the Magistrate Judge's conclusion that her original complaint did not comply with Rule 9(b), citing to a line of cases and noting that "if the alleged fraud occurred over an extended period of time and consisted of numerous acts, the specificity requirements are applied less stringently." ***United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F.Supp.2d 1201, 1215 (M.D. Fla. 1999)**. As the Magistrate Judge correctly noted, the Fourth Circuit has not applied this relaxed standard to FCA cases. ***Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999)**. Even under this less stringent standard, "this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." ***United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (citations and quotations omitted)**. Furthermore, "[a]llegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's belief." ***Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000) (citations and quotations omitted)**. Likewise, even where the complaint alleges a widespread or long-running fraud, "[it] must still adduce specific facts supporting a strong inference of fraud or it will not satisfy

even a relaxed pleading standard." ***Butler*, 71 F.Supp.2d at 1215 (citations and quotations omitted)**.

Even under the relaxed standard proposed by Wilson, not only does the original complaint fail to set forth specific facts supporting the allegations of fraud against many of the Defendants sufficient to comply with Rule 9(b), but the proposed First Amended Complaint fall short as well. The complaint does set forth some of the alleged instances of fraud with sufficient particularly, but it does not do so for all Defendants. Nor does the complaint allege that the absence of specificity is because certain information is in the hands of some or all of the Defendants. "[T]he circumstances required to be pled with particularly under Rule 9(b) are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." ***Harrison*, 176 F.3d at 783-84 (citations and quotations omitted)**. At a minimum, Wilson must allege which fraudulent statements were made by whom, when they are made, what each Defendant gained as a result of these claims, or that she is unable t plead that information with particularity because it is in the control of the Defendants.

2. Conspiracy Claims

The Cherokee County Board, the Graham County Board, Laney, Morrow, Postell, Williams, Wiggins, and Cody also assert that Wilson's claim of conspiracy does not adequately allege the elements of conspiracy and should be dismissed. Conspiracy claims are not covered by Rule 9(b). This

contention is a motion to dismiss pursuant to 12(b)(6) for failure to state a claim. "To establish a civil conspiracy, [Wilson] must [allege] that the Defendants acted jointly in concert and that some overt act was done in furtherance of the conspiracy." ***United States ex rel. Phillips v. Pediatric Servs. of America, Inc.*, 142 F.Supp.2d 717, 733 (W.D.N.C.. 2001)**. These Defendants assert that the complaint merely alleges that they violated the FCA by "perpetrating and participating in, and conspiring to participate in," fraudulent submissions. **Complaint, ¶ 38**. Certainly, this allegation, standing alone, fails to state a claim for civil conspiracy. Taken as a whole, the complaint asserts that at least some of the Defendants did agree to submit some false claims and committed some overt act in furtherance of that agreement; however, none of the moving Defendants appear to be implicated in this conspiracy. Given the overall lack of clarity in the complaint, the large number of Defendants named, and the generalizations made about relevant conduct, the Court will allow Wilson an opportunity to clarify the conspiracy charges as well as the fraud allegations.

The Magistrate Judge admonished both Wilson and her attorneys to consider the strictures of both Rules 9(b) and 11 in formulating their amended complaint. The Court reiterates that admonition. All Defendants' motions to dismiss are denied as to the first cause of action as a *qui tam* relator without prejudice to renewal. Wilson's motion to amend is allowed, but the proposed First Amended

Complaint is rejected as inadequate. She will be allowed 20 days in which to file a Second Amended Complaint, bearing in mind the points raised in the motions to dismiss and the admonitions of the Magistrate Judge and this Court.

C. Statute of Limitations

The Court notes that the Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell have moved to dismiss the claim for retaliatory discharge on the grounds that Wilson was never in their employ. The Cherokee County Board, Laney, Morrow, and Postell also raised the statute of limitations as a grounds for dismissal. The Magistrate Judge's Recommendation does not substantively address this issue, stating that "an issue has arisen as to whether the claims of relator were filed within the period of limitations," and that it "may be revisited at an appropriate time." **Memorandum and Recommendation, at 2, n.2.**

> A civil action under the FCA may not be brought
> (1) more than 6 years after the date on which *the violation of section 3729* is committed, *or*
> (2) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the *official of the United States charged with responsibility to act in the circumstances*, but in no event more than ten years after the date on which the violation is committed, *whichever occurs last.*

31 U.S.C. § 3731(b) (emphasis added). The phrase "official of the United States charged with the responsibility to act" means "pertinent Department of Justice officials." ***United States v. Tech Refrigeration*, 143 F.Supp.2d 1006, 1009 (N.D. Ill. 2001).** However, "there may be circumstances in which the knowledge of government agencies other than the Department of Justice might trigger the running of the FCA statute of limitations." ***Id.*, at 1010.** This statute provides for aq six year statute of limitations, but includes a tolling provision in the event that fraudulent claims go undiscovered for a considerable period of time. The statute of repose sets the outer limit for FCA claims at ten years.

Currently there is a division among the federal courts as to the correct application of this section to FCA claims made by *qui tam* relators. ***United States ex rel. Colunga v. Hercules, Inc.*, 1998 WL 310481 (D. Ut.) (Holding that the tolling provision of § 37371(b)(2) does apply to *qui tam* relators, but that the relevant knowledge for purposes of calculating time is the knowledge of the "official of the United States"); *Unites States ex rel. Saaf v. Lehman Bros.*, 123 F.3d 1307 (9th Cir. 1997); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); *United States ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160 (D.N.M. 2000) (all holding that the tolling provision of § 3731(b)(2) does apply to relators, but that the timing of the *relator's* knowledge controls its application to a *qui tam* action); *United States ex rel.***

***Thistlethwiate v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.N.Y. 1998); *United States ex rel. El-Amin v. George Washington University*, 26 F.Supp.2d 162 (D.D.C. 1998) (holding that the tolling provision of § 3731(b)(2) does not apply to *qui tam* actions at all, leaving only the 6 year limitation of § 3731(b)(1))**. The Court adopts the Ninth Circuit's approach to this question as reflected in *Hyatt* and *Saaf*. As such, any claims alleged by Wilson as a *qui tam* relator for conduct which occurred before January 25, 1995, are time barred, unless she did not know or reasonably should not have known of facts material to the action before January 26, 1998. ***See, Downy*, 118 F.Supp.2d at 1171 ("the limitations provisions of Section 3731 are referring to the relator's initial act of filing the civil action, not to the later date when the complaint is unsealed")**.

In reviewing the Complaint, several of Wilson's allegations appear to fall outside this period of limitation. She alleges that Defendants Greene, Timpson, Orr, and others submitted false claims to the Agricultural Cost Share Program beginning in 1993. **Complaint, ¶ 48**. She also does not specify when any false claims were submitted to the Farm Services Agency Program. It is also worth noting that, on the face of the Complaint, Wilson alleges that Greene and Orr knew that she was contemplating "reporting them" on November 6, 1995. **Complaint, ¶ 57**. If Wilson was contemplating reporting conduct relevant to some of her FCA claims in November 1995, she was aware facts

"material" to those particular claims well more than 3 years before her Complaint was filed. Any such claims are hereby dismissed and need not be included in an Amended Complaint.

Additionally, Defendants Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell argue that § 3731(b) does not apply to Wilson's claim under § 3730(h) for retaliatory discharge, citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). The Ninth Circuit in *Lujan* found that Congress intended to exclude § 730(h) form the provisions of § 3730(b), based on the language of the two sub-sections, both of which were added to the FCA by the 1986 amendments. ***Id.*, at 1034-35**. The 1986 amendments changed the language of § 3731(b) to include the following limitation, "6 years after the date on which the violation *of section 3729* is committed. . .". ***Id.* (emphasis added)**. Because a retaliation claim is not a violation of § 3729 but rather a violation of § 3730(h), the Ninth Circuit reasoned that § 3731(b) did not apply to the retaliation claims under § 3731 at all. ***Id.*, at 1035**. As such, the *Lujan* court decided to "apply the most closely analogous statute of limitations under state law." ***Id.* (citing *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989))**. Application of § 3731(b) to a retaliation claim would lead to some absurd or incomprehensible outcomes. For example, an employee raising FCA claims which later prove to be unfounded but who was discharged for raising those allegations might be

precluded from false claims to the Agricultural Cost Share Program beginning in 1993. **Complaint, ¶ 48**. She also does not specify when any false claims were submitted to the Farm Services Agency Program. It is also worth noting that, on the face of the Complaint, Wilson alleges that Greene and Orr knew that she was contemplating "reporting them" on November 6, 1995. **Complaint, ¶ 57**. If Wilson was contemplating reporting conduct relevant to some of her FCA claims in November 1995, she was aware facts "material" to those particular claims well more than 3 years before her Complaint was filed. Any such claims are hereby dismissed and need not be included in an Amended Complaint.

Additionally, Defendants Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell argue that § 3731(b) does not apply to Wilson's claim under § 3730(h) for retaliatory discharge, citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). The Ninth Circuit in *Lujan* found that Congress intended to exclude § 3730(h) from the provisions of § 3730(b), based on the language of the two sub-sections, both of which were added to the FCA by the 1986 amendments. ***Id.*, at 1034-35**. The 1986 amendments changed the language of § 3731(b) to include the following limitation, "6 years after the date on which the violation *of section 3729* is committed." ***Id.* (emphasis added)**. Because a retaliation claim is not a violation of § 3729 but rather a violation of § 3730(h), the Ninth Circuit reasoned

that § 3731(b) did not apply to retaliation claims under § 3731 at all. ***Id.*, at 1035**. As such, the *Lujan* court decided to "apply the most closely analogous statute of limitations under state law." ***Id.* (citing *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989))**. Application of § 3731(b) to a retaliation claim would lead to some absurd or incomprehensible outcomes. For example, an employee raising FCA claims which later prove to be unfounded but who was discharged for raising those allegations might be precluded from bringing a § 3730(h) claim at all. An employer would argue that no § 3729 violation occurred, meaning that the statute of limitations never began to run, crating the inference that no cause of action ever accrued tot he employee for a violation of § 3730(h). ***See, United States ex rel. Ackley v. IBM, Corp.*, 110 F.Supp.2d 395, 401-02 (d. Md. 2000) (noting this and other unusual results from a literal application of § 3731(b) to a § 3730(h) claim and applying Maryland law under the holding of *Lujan*.)**. As such, this Court will apply the most closely analogous state statute of limitations.

Under the North Carolina law, the statute of limitations on a claim for wrongful discharge is three years from the date of discharge. ***Renegar v. R. J. Reynolds Tobacco Co*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229 (2001) ("It is undisputed that the statute of limitations for a wrongful discharge action under North Carolina law is three years from the date of discharge.") (*citing* N.C. Gen. Stat. § 1-52(5) (1999))**. As such, the time for Wilson to bring her

claim for retaliatory discharge under 3730(h) expired on March 7, 2000, three years after the effective date of her resignation. Wilson does not allege any facts which would support an argument that the statute should be tolled for any reason. Because Wilson did not file her Complaint until January 25, 2001, her cause of action for retaliatory discharge is time barred and is dismissed as to all Defendants.[3]

IV. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motions to dismiss the Plaintiff's first cause of action as a *qui tam* relator under the False Claims Act are hereby **DENIED** without prejudice to renewal after the filing of Plaintiff's Second Amended Complaint.

IT IS FURTHER ORDERED that the Plaintiff's motion to amend is **ALLOWED**, and the Court orders that any amendment relate back to the Complaint's original filing date. Plaintiff shall file her Second Amended Complaint within 20 days from entry of this Order.

IT IS FURTHER ORDERED that the Defendants' motions to dismiss Plaintiff's second cause of action for retaliatory discharge is hereby **ALLOWED**, and such claim is hereby **DISMISSED WITH PREJUDICE** as to all Defendants.

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[3] Further more, the Complaint on its face alleges that Wilson was employed by the Graham County District. As such, the cause of action under § 3730(h) would otherwise be dismissed against all Defendants other than the Graham County District.

THIS the 30th day of May, 2002.

/s/ Lacy H. Thornburg

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM OF OPINION AND CERTIFICATION OF APPEAL, DATED SEPTEMBER 19, 2002

UNITED STATES EX REL., KAREN T. WILSON,
Plaintiffs,

Vs.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; and EDDIE WOOD,
Defendants.

CIVIL NO. 2:01CV19

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, BRYSON CITY DIVISION

224 F. Supp. 2d 1042; 2002 U.S. Dist. LEXIS 17987
September 19, 2002, Decided

[*1045]MEMORANDUM OF OPINION AND CERTIFICATION FOR APPEAL

THIS MATTER is before the Court on the following: motion of Defendants Cherokee County Soil & Water Conservation District (the Cherokee County District), Bill Tipton, Eddie Wood, and C.B. Newton to dismiss, filed July

MEMORANDUM OF OPINION AND CERTIFICATION OF APPEAL, DATED SEPTEMBER 19, 2002

12, 2002; the motion of Defendants Graham County Soil & Water Conservation District (the Graham County District), Gerald Phillips, Allen Dehart, and Lloyd Millsaps to dismiss, filed July 12, 2002; Defendant Jimmie Orr's [*1046] motion to dismiss, filed July 12, 2002; the motion of Defendants Graham County, Raymond Williams, Dale Wiggins, and Lynn Cody to dismiss, filed July 12, 2002; and Relator Karen Wilson's motion for reconsideration of the Court's dismissal of the retaliation claim or, in the alternative, for certification of the Memorandum and Order filed May 30, 2002, pursuant to 28 U.S.C. § 1292(b), [**4] filed July 31, 2002. Responses have been filed and the motions are ready for resolution.

I. PROCEDURAL HISTORY

On January 25, 2001, Relator Karen Wilson brought a *qui tam* action against Defendants alleging violations of the False Claims Act (FCA), 31 U.S.C. § § 3729, *et seq.* n1 She further alleged that when she attempted to bring these false claims to light, her supervisor and co-workers retaliated against her, resulting in her constructive discharge in violation of § 3730(h) of the FCA. In the Memorandum and Opinion filed May 30, 2002, the Court denied the motions to dismiss based on municipal immunity as to all Defendants and granted the Relator's motion to amend her complaint. Further, the Court granted the Defendants' motions to dismiss the second cause of action for retaliatory discharge and dismissed the claim with prejudice as to all Defendants. On June 19, 2002, the Relator filed her Second Amended Complaint again alleging violations of the False

Claims Act, 31 U.S.C. § § 3729, *et seq*. Defendants then filed their respective motions to dismiss.

> n1 A *qui tam* action is authorized by the False Claims Act which provides that any person may bring a civil suit for a violation of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). [**5]

II. DISCUSSION

A. The Rule 9(b) Motions.

Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, and Millsaps have filed motions to dismiss based on Fed. R. Civ. P. 9(b). The Rule states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of the mind of a person may be averred generally." Fed. R. Civ. P. 9(b). A complaint in a *qui tam* action under the FCA must comply with the requirements of Rule 9(b). *See, United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018 n.26 (E.D. Va. 1995) (noting that the applicability of Rule 9(b) to *qui tam* actions is well established); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1058 (S.D. Ga. 1990) (clarifying Congress' intent to continue to apply Rule 9(b) to FCA actions after the 1986 FCA amendments); *see also, United State ex rel. Robinson v. Northrop Corp.*, 149 F.R.D.

142, 144 (N.D. Ill. 1993). To satisfy Rule [**6] 9(b), a complaint must plead with particularity the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (citations omitted). Other courts have described the requirements as the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F. Supp. 2d 141, 147 (D. Mass. 2000).

Rule 9(b) ensures that defendants have sufficient knowledge of the claims against them in order to prepare an appropriate defense, it protects defendants from [*1047] frivolous suits, it eliminates fraud suits where all of the factual information is learned through discovery, and it protects defendants from injury to their reputation. *See, Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. at 1056-57.

A court, however, should be reluctant to dismiss an action pursuant to Rule 9(b) if the court is satisfied that "(1) the defendant has been made aware of the particular circumstances for which she will [**7] have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Harrison, supra.* Additionally, Rule 9(b) must be applied together with Fed. R. Civ. P. 8(a), which requires a "short and plain statement of the claim." The Relator, therefore, is required to plead the circumstances of the fraud, but is not required to present all of the evidence or facts supporting the allegations. *See United States ex rel. Franklin v. Parke-Davis, Div. of*

Warner-Lambert Co., 147 F. Supp. 2d 39, 46-47 (D. Mass. 2001) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 at 625-26 (2d ed. 1990). When the facts underlying the fraud are within the control of the defendant, for example, the Relator may be permitted under Rule 9(b) to plead the circumstances of the fraud with less precision. *See Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 866 (1st Cir. 1993); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3rd Cir. 1989). In this case, the Court finds the Relator has satisfied the Rule 9(b) pleading requirements as to [**8] all relevant Defendants.

1. Federal Emergency Watershed Protection Program.

In her complaint, the Relator describes several instances of alleged fraud under the Emergency Watershed Protection Program for Graham, Cherokee and Clay Counties (hereinafter, EWP-216). The alleged false claims under EWP-216 involve Defendants Graham County Board, Graham County, Williams, Cherokee County Board, Cherokee County. Relator contends that these Defendants knowingly issued and approved improper payments for work that was not performed, not approved of, or performed improperly or secretly. These allegations meet the requirements of Rule 9(b) in terms of time, place, and contents of the false representation, as well as the identity and advantage gained by the perpetrator. As for the time requirement, Relator has presented a sufficiently narrow time period during which the alleged misrepresentations

took place. She has given specific dates on which requests for payments were made and checks were issued. Relator sufficiently addressed the place requirement by detailing the specific meetings and offices in which the allegedly false claims were made. Further, Relator adequately describes the contents [**9] of the false representations. She specifically addresses claims that were made for work not performed, improper claims that were approved, and secret and unapproved work that was performed in order to make fraudulent claims for payment. She then identifies, by name, each Defendant involved in the EWP-216 fraud and explains his role.

The Relator is not as specific in explaining what benefit each Defendant gained by committing fraud. She describes the motive as "to curry political and personal favor from the individual recipients of the ill-gotten funds and their family, friends and associates and thereby did obtain and enjoy such personal and political gain." Second Amended Complaint, filed June 19, 2002, P 31(o). While the allegation is made in general terms, it is sufficient to defeat a motion to dismiss. As Relator properly pled, both the motive and benefit gained are the type of information [*1048] that is in the exclusive control of each Defendant. Under these circumstances, the Relator is not required to plead these allegations any more specifically. *See Boston & Maine Corp., supra.* The Relator's complaint regarding EWP-216, therefore, is pled with sufficiently [**10] specific allegations and meets the requirements for Rule 9(b). The Defendants' motions to dismiss are therefore denied.

2. Farm Services Agency Program

In her complaint, Relator describes false claims made under the Farm Services Agency Programs (hereinafter, FSA); Defendants Graham County, the Graham County Board and Phillips have moved to dismiss these claims. These allegations also meet the requirements of Rule 9(b) in terms of time, place, and contents of the false representation, as well as the identity and advantage gained by the perpetrator. Relator meets the time requirement, by specifying the month and year of each false claim. She then adequately fulfills the place requirement by specifying the county and office in which the events occurred. Relator then explains the contents of the false representations by describing a Trout Waste Storage Structure and a Waste Storage Structure that were paid for with government funds. These structures were built and payment was approved despite the allegations that the projects did not meet the prerequisites for the funding. Finally, Relator alleges that the relevant Defendants received "personal and political gain" as a result [**11] of the false claims. This statement is sufficient for Rule 9(b) purposes. It gives Defendants proper notice of the alleged facts of the case and allows them to begin to prepare a defense. *See Harrison,* 176 F.3d at 784. The Second Amended Complaint, therefore, satisfies Rule 9(b) with respect to the FSA false claims and these Defendants, and the motions are denied.

3. Other False Claims Act Violations

Relator makes further, general allegations of violations of the FCA in her complaint. See, Second Amended

Complaint, Sections C and D, PP 39-69. These allegations are too general in nature to satisfy Rule 9(b). Relator fails to state the FCA claims to any degree of particularity. She does not indicate the time, place or content of any false claims. Further, it is unclear from these sections of the complaint what precisely the false claims are. Because of Relator's failure to specify her allegations in these sections of the complaint, any claims contained in Sections C and D of the complaint are dismissed.

B. Rule 12(b)(6) Motions

Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, Millsaps, Graham County, [**12] Williams, Wiggins and Cody have filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The purpose of a Rule 12(b)(6) motion is to test the adequacy of a complaint. It does not resolve arguments regarding the facts, merits of the claims or the possible defenses. *See Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992). When deciding a motion to dismiss for failure to state a claim, the Court must "accept the factual allegations in the plaintiff's complaint and must construe those facts in the light most favorable to the plaintiff . . . [Dismissal is appropriate] only if it appears beyond doubt that the plaintiff[] can prove no set of facts in support of [her] claim that would entitle [her] to relief." *Flood v. New Hanover County,* 125 F.3d 249, 251 (4th Cir. 1997). "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint need only outline a recognized legal or

equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence [*1049] and which, if proven, will justify some form of relief." Shepard's, *Motions in Federal Court,* § 5.123, [**13] at 366 (2d ed. 1991). If "relief could be granted under any set of facts that could be proved consistent with the allegations," the motion must be denied. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984).

The FCA provides:

Any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . is liable to the United States Government for a civil penalty.

31 U.S.C. § 3729(a). The test for liability under the FCA is "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison,* 176 F.3d at 788. This test should be construed

broadly. The FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government ... The Court has consistently refused to accept a rigid, restrictive reading [of the Act]." *Id.* (quoting *United States v. Neifert-White Co.,* 390 U.S. 228, 233, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968)).

1. EWP-216 and FSA Claims

Relator's EWP-216 and FSA allegations are sufficient to survive the 12(b)(6) motions. Relator outlines several instances involving false statements or claims that resulted in the improper payment of government money. Further, she alleges the appropriate scienter and addresses the issue of materiality. In construing the facts in the light most favorable to the Realtor, as the Court must do at this stage of litigation, she has successfully stated a claim against most of the Defendants. Specific Rule 12(b)(6) arguments that were made by individual Defendants are addressed below.

2. Injury in Fact

Defendants Graham County, Williams, Wiggins, and Cody argue that the Relator failed to state a claim because she did not establish an injury in fact suffered by the government and she did not show how these Defendants personally benefitted from the claims. First, injury in fact is not a required element for an FCA claim. *See*, 176 F.3d at 785 n.7 ("In fact, there is no requirement that the government have suffered damages as a result of the fraud."). Relator, therefore, was not required to show injury in fact in her complaint. Second, Relator alleges that these

Defendants did gain personal benefit from the false claims. They received "personal and political gain" from these acts. This wording is sufficient to survive a 12(b)(6) motion to dismiss and, therefore, the motions are denied.

3. Individual Capacity

Defendants Newton, Tipton and Wood argue that any claim against them in their individual capacity should be dismissed under Rule 12(b)(6). After careful consideration, the Court agrees. Individual liability under the FCA must be pled with specificity and cannot be based exclusively on inserting the words "individual capacity" into the complaint. See *Lizzi v.* [*1050] *Alexander,* 255 F.3d 128, 136-37 (4th Cir. 2001), *cert. denied*, 534 U.S. 1081, 151 L. Ed. 2d 697, 122 S. Ct. 812 (2002) (citing *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 543, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)). [**16] Any specific claim of individual liability must meet the requirements of Rule 12(b)(6).

Here, Relator Wilson has failed completely to allege that Defendants Newton, Tipton, and Wood, as individuals, did anything in violation of the FCA. Their names are not included in any part of the factual allegations of the complaint. The mere incantation of the term "individual capacity" is not sufficient to state a claim against these individuals. *See,* 255 F.3d at 137. The claims against these Defendants in their individual capacities, therefore, are dismissed pursuant to Rule 12(b)(6). However, the Realtor's claims against these Defendants in their official capacities remain.

4. Conspiracy Claim

Defendant Phillips moves to dismiss the conspiracy claim made against him pursuant to Rule 12(b)(6). Section 3729(a)(3) of the FCA provides that liability shall attach to any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). General civil conspiracy principles apply to conspiracy claims under the FCA. *See, United States ex rel. Durcholz v. FKW, Inc.,* 189 F.3d 542, 546 n.3 (7th Cir. 1999). [**17] "The essence of a conspiracy under the Act is an agreement between two or more persons to commit a fraud." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.,* 721 F. Supp. 1247, 1259 (S.D. Fla. 1989) (citing *Blusal Meats Inc. v. United States,* 638 F. Supp. 824, 828 (S.D.N.Y. 1986)). To allege civil conspiracy, the Relator must plead that the Defendants made an agreement to commit an illegal act, resulting in the Relator's injury. Specifically, the Relator must show: "(1) that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; [and] (2) that one or more conspirators performed any act to effect the object of the conspiracy." See, *United States, ex rel. Wilkins v. North American Constr. Corp.,* 173 F. Supp. 2d 601, 639-40 n.33 (S.D. Tex. 2001) (citations omitted); *see also, Thomas v. City of New Orleans,* 687 F.2d 80, 83 (5th Cir. 1982) (citations omitted). The Relator is not required to show specific damages from the injury. See, *Harrison,* 176 F.3d at 785 n.7. [**18]

In her complaint, Relator Wilson alleges that Defendant Phillips conspired with other members of the Graham County Board to discuss payment of Keith Orr's false claims. Relator identifies one meeting held in furtherance of this conspiracy. She also identifies one payment to Keith Orr that could have been the result of this meeting. Taking these allegations as true, as the Court must do at this point, Relator has sufficiently stated a claim of conspiracy under Rule 12(b)(6). Defendant's motion to dismiss is therefore denied.

C. Relator's Motion for Reconsideration of Retaliation Claim Ruling or, in the Alternative, Motion for 28 U.S.C. § 1292(b) Certification of Order

Relator Wilson has moved for the Court to reconsider its earlier ruling dismissing her retaliation claim as time-barred in light of a new decision from the Eastern District of Virginia. *See, Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002). After careful consideration, this Court declines to adopt that Court's ruling. Applying the standard outlined in *Lujan,* the applicable statute of [*1051] limitations in an FCA retaliation claim is taken from the [**19] most analogous state statute. *See, United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). North Carolina's statute of limitations for wrongful discharge is three years from the date of discharge. *Renegar v. R. J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229, review denied, 354 N.C. 220, 554 S.E.2d 344 (2001). This statute of limitations will apply to

retaliation claims under § 3730(h) of the FCA. Because she filed her retaliation claim more than three years after her discharge, Relator's retaliation claim is time-barred.

The Court, however, finds that this issue is proper for an immediate appeal and certification under 28 U.S.C. § 1292(b). In order to grant certification under § 1292(b), a district court must find that the order at issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1291(b). "[A] question is controlling if its incorrect [**20] disposition would require reversal of a final judgment for further proceedings." *State ex rel. Howes v. W. R. Peele, Sr. Trust,* 889 F. Supp. 849, 852 (E.D.N.C. 1995). The decision of whether to certify an order for interlocutory appeal is within the discretion of the district court. See, *Young v. Sheetz, Inc.*, 998 F. Supp. 670, 673 (W.D. Va. 1998).

Here, the controlling question of law is the proper statute of limitations for a retaliatory discharge claim under the FCA. There is a difference of opinions among circuit courts. *See, Lujan,* 162 F.3d at 1035 (9th Circuit holding that the statute of limitations for retaliatory discharge claims under the FCA is the same as the most analogous state statute); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 866 (7th Cir. 1994) (holding that the statute of limitations for all FCA claims, including retaliatory discharge, is six years). If the proper statute of limitations is taken from the most analogous state statute, then it would be three years under a

North Carolina wrongful discharge claim and the Relator's claim is time-barred. If the proper statute of limitations [**21] is six years, then the Relator's claim is timely. Resolving this issue at this point in the litigation will potentially prevent duplicative litigation at a later date. Pursuant to § 1292(b), the Court is of the opinion that the ruling dismissing the Relator's retaliatory discharge claim as time-barred involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The motion for certification for appeal on the issue of the proper statute of limitations for the retaliatory discharge claim under the FCA is therefore granted.

D. Motion to Dismiss by Defendant Jimmie Orr

On July 12, 2002, the Defendant Jimmie Orr filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim. He is not named as a Defendant in the Relator's Second Amended Complaint; the Relator eliminated Defendant Orr from this action when she amended her complaint and did not make any allegations against him. "A plaintiff wishing to eliminate particular claims or issues from the action should amend the complaint under Rule 15(a)." Moore's [**22] *Federal Practice 3d,* § 41.21[2] (citing *Skinner v. First Am. Bank of Virginia,* 64 F.3d 659 (table), 1995 WL 507264 (4th Cir. 1995)). Because Jimmie Orr is no longer a party to this action, he lacks standing to seek dismissal and his motion to dismiss is denied as moot.

[*1052] III. ORDER

IT IS, THEREFORE, ORDERED that the motions to dismiss filed July 12, 2002, by Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, and Millsaps pursuant to Fed. R. Civ. P. 9(b) are hereby DENIED as to the Relator's claims pertaining to the Federal Emergency Watershed Protection Program and the Farm Services Program; the motions are ALLOWED as to the Relator's remaining claims contained in Sections C and D of the Second Amended Complaint and such claims are hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the motions to dismiss filed July 12, 2002, by Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, Millsaps, Graham County, Williams, Wiggins and Lynn Cody pursuant to Fed. R. Civ. P. 12(b)(6) are hereby DENIED, except that the motion of Newton, Tipton and Wood to dismiss [**23] Relator's claims against them in their individual capacities is ALLOWED, and such claims are hereby DISMISSED WITH PREJUDICE. The Relator's claims against these individual Defendants in their official capacities remain.

IT IS FURTHER ORDERED that the separate motion to dismiss filed by Jimmie Orr pursuant to Fed. R. Civ. P. 12(b)(6) is hereby DENIED as moot as he is no longer a party to this action.

IT IS FURTHER ORDERED that the Relator's motion for reconsideration of the dismissal of her claim for retaliation is hereby DENIED. Alternatively,

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

IT IS FURTHER ORDERED that the Relator's motion for certification of the Memorandum and Order of May 30, 2002, pursuant to 28 U.S.C. § 1292(b) is hereby ALLOWED, and the issue of the proper statute of limitations for a retaliatory discharge claim under the False Claims Act, 31 U.S.C. § § 3729, *et seq.*, is hereby certified for interlocutory appeal.

THIS the 19th day of September, 2002.

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

UNITED STATES EX REL. KAREN T. WILSON,

Plaintiffs,

Vs.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; RICHARD GREENE; CHERIE GREENE; WILLIAM TIMPSON; RICKY STILES; KEITH ORR; BETTY JEAN ORR; RAYMOND WILLIAMS; DALE WIGGINS; JOYCE LANE; GERALD PHILLIPS; ALLEN DEHART; JIMMY ORR; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; BILL TIPTON; LLOYD KISSLEBURG; C. B. NEWTON; EDDIE WOOD; TED ORR; BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS; and GOVERNMENTAL ENTITLES 1-99,

Defendants.

2:01cv19-T

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, BRYSON CITY DIVISION

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

March 26, 2002, Decided

THIS MATTER is before the court upon the following motions: (1) the motion to dismiss of defendants Graham County Board of County Commissioners, Raymond Williams, Dale Wiggins, and Lynn Cody (#31); (2) the motion to dismiss and for more definite statement of defendants Cherokee County Soil & Water Conservation District, Bill Tipton, Eddie Wood, and C. B. Newton (# 61); (3) the motion to dismiss of defendants Cherokee County Board of County Commissioners, Charles Laney, Eugene Morrow, and George Postell (# 62); (4) Relator's Motion for Leave to Amend Her Complaint (# 75); and (5) motion to dismiss of defendants Graham County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Jimmy Orr, and Lloyd Millsaps (#77). In addition to the memoranda submitted, oral arguments were presented at a hearing on February 20, 2002.

The primary issue presented is whether the False Claims Act ("FCA"), which provides for mandatory punitive damages, extends to municipalities that enjoy common-law governmental immunity from punitive damages. Other issues have also been presented, including whether some of the individual defendants sued in their individual capacities should be dismissed, whether relator should be allowed to amend her complaint to name the real parties in interest, n1 and whether relator has complied with the requirements of Rule 9(b), Federal Rules of Civil Procedure. In addition, an

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

issue has arisen as to whether the claims of the relator were filed within the period of limitations. n2

n1 The undersigned does not reach this issue because it appears that the named defendants enjoy municipal immunity. If the district court finds the need to reach such issue on review, it would be the recommendation of the undersigned that such amendment be allowed, inasmuch as the counties are the real parties in interest, they are the only governmental parties capable of being sued under prevailing law, and they had actual knowledge of the suit when the improperly named defendants were served. The undersigned simply would not concur in defendants' response to relator's motion to amend because prevailing case law would not support so strongly penalizing a procedural misstep. *See Ward Electronics Service, Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987).

n2 Defendants point to a shorter, state-law based period of limitation. Relator, however, cites a substantially longer period, which involves the FCA and reporting the fraud to the Attorney General of the United States. Because it is unclear when the Attorney General was made aware of these claims, this court is not in the position to determine

whether this action was brought within the period allowed. If this case survives the present motions, that issue may be revisited at an appropriate time.

I. Background

A. Nature of the Action

This action arises under the False Claims Act--31, United States Code, Sections 3729, *et seq.* n3 The relator is a former employee of defendant Graham County Soil & Water Conservation District. n4 She alleges that defendants conspired and participated in various schemes to defraud the United States by presenting false claims for payments under federal financial-aid programs intended to aid farmers and other landowners.

n3 Section 3729 provides, as follows:

(a) Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

n4 The undersigned notes that it is undisputed that relator was an employee of this defendant, not the other municipal defendants, and that any retaliation claim could only be asserted against her "employer." As discussed *infra*, relator's general allegations and lumping parties together has caused a great deal of confusion in this matter, as evidenced by the 84 docket entries already made in this matter before issues have joined.

B. Summary of the Factual Allegations

The following summary is not intended to be all inclusive or binding, but to aid further review by giving the motions context. Relator's allegations of false claims, in part, stem from a federal disaster-relief program, "EWP-216," which was instituted through the Emergency Watershed Protection Program to assist with damage to streams and creeks caused by a storm in February 1995. According to the

allegations of the complaint, the following wrongful conduct occurred under the EWP-216 program: (1) inspectors under the program were paid for work that was not done and for work which was not properly bid, and they conspired [*7] with land owners to submit false claims; (2) conservation district supervisors conspired with the inspectors to approve those requests; (3) inspectors conspired with supervisors and others to privately sell and split the proceeds of timber that was removed as part of the federal program; and (4) the county commissions knowingly submitted false claims to federal authorities for payment.

Relator also contends that false claims were submitted and conspired to by many of the same defendants under the "North Carolina Agricultural Cost Share Program," which was federally funded. Relator alleges that certain defendants conspired with county conservation district employees or contractors to submit false claims for filter fabric and pipe--apparently, materials used to inhibit erosion and stream sedimentation--that was "sold" at inflated prices to landowners and/or never actually purchased or installed. According to relator, such conduct began in 1993 and ran through 1996.

Relator also contends that certain defendants submitted false claims under the Farm Services Agency Program. She claims that defendants engaged in self-dealing and approved projects which did not meet program guidelines. She has made additional claims concerning noncompliance with federal regulations and other alleged improprieties.

Realtor also alleges that she was harassed in her employment for bringing these matters to light. Such harassment, she claims, caused her certain medical problems and led to her constructive discharge in March 1997.

C. Relator's Causes of Action

In Count One, relator asserts a cause of action under the False Claims Act and seeks mandatory statutory treble damages, in addition to the statutory civil penalty for each violation, plus the relator's costs and attorneys' fees.

In Count Two, relator asserts a cause of action for a False Claims Act retaliation violation by her former employer, Graham County Soil & Water Conservation District, and the district supervisors, whom she contends were her "de facto" employers based on their domination of the district for their improper personal use.

II. Standard

Defendants have moved for dismissal pursuant to Rule 12(b), Federal Rules of Civil Procedure, contending that plaintiff has failed to state a cognizable claim. Rule 12(b) authorizes dismissal based upon a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 1832 (1989); [*9] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957). As the Court discussed in *Neitzke*:

> This procedure [for dismissal], operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and fact finding. Nothing in Rule 12(b)(6)

> confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts . . . a claim must be dismissed, without regard to whether it is based on outlandish legal theory . . . . What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations."

Id., at 1832 (citation omitted). For the limited purpose of making recommendations as to disposition of defendants' motions, the undersigned has accepted as true the facts alleged by plaintiff in the complaint and has viewed them in a light most favorable to relator.

III. Motions to Dismiss Based on Common-Law Municipal Immunity

A. Overview

Although defendants have provided other grounds for dismissal, the central issue presented is whether the False Claims Act, which provides for mandatory punitive damages, was intended by Congress to extend to local governments, which enjoy common-law municipal or governmental immunity from punitive damages. Two circuits have held that the FCA does not extend to local governments; one circuit has held that it does. The undersigned, after much consideration, will, respectfully, follow the decisions of the circuits holding that the FCA does not extend to municipal governments.

B. Origin and Development of Municipal Immunity

Municipal immunity is the direct offspring of sovereign immunity. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, n.19 (1981). n5 Sovereign immunity begins with the notion that "the King can do no wrong," and that he could not be sued of right in his own courts. W. Prosser, The Law of Torts 125, at 996-97 (3d ed. 1964). *See Muskopf, supra*, n.1 ("Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state.")

> n5 For a differing view as to the origin as well as the continued need for municipal immunity, *see* Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 216 (1961).

Municipal immunity was first recognized at common law in *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). In *Russell*, the plaintiff attempted to sue an unincorporated county for damages in tort, but the action was dismissed because the court found that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep., at 362. Such absolute immunity of municipal governing authorities, however, has gradually eroded in the last two centuries.

In explaining the important public policy concerns which continue to form the foundation of municipal immunity, the Supreme Court in *City of Newport*, *supra*, quoted the following language from a decision, which held that the city should not bear punitive damages for the malicious acts of its municipal officers:

> "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . [*12] ., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification."

Id., at 261 (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)). The Court went on to hold that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *City of Newport*, *supra*, at n.21.

C. The Supreme Court Recognizes the Continued Vitality of Municipal Immunity

In *City of Newport*, plaintiff Fact Concerts, Inc., brought an action against the city when it unilaterally cancelled a rock concert based on fears that the crowd would be unruly. Plaintiff contended that the city had violated the protections afforded under 42, United States Code, Section 1983, by tortiously interfering with its first-amendment rights, and sought punitive damages. In finding that the city was

immune from punitive damages [*13] under Section 1983, the Court held, as follows:

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.
>
> * * *
>
> In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of 1983 and general purposes of public policy, we hold that a municipality is immune from punitive damages under 42 USC 1983.

Id., at 266-67 & 271.

D. Creation of the FCA in 1863 and Amendment in 1986

It is undisputed that the FCA was created in 1863 in response to widespread fraud by military contractors, not municipalities. n6 It is equally undisputed that between 1863 and 1986, the FCA, which occasionally was amended, remained virtually unchanged, providing for remedial "double damages." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999).

> n6 "The FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" Stevens, infra, at 781.

In 1986, Congress amended the FCA by providing for treble damages. As relator argues, trebling damages was intended, as the Harrison court found, to unleash a "posse of ad hoc deputies to uncover and prosecute frauds against the government." *Id.,* at 783. The 1986 amendment, however, did not meaningfully alter the definition of "persons" covered by the Act. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

E. The FCA After the 1986 Amendments

In Stevens, *supra*, the Supreme Court dismissed relator's FCA action based on the common-law presumption against imposition of punitive damages on governmental entities, but specifically declined to reach the issue of whether such an action would have been barred under the eleventh amendment.n7 The Court explained its decisional process, finding, as follows:

> We nonetheless have routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent).

Id., at 779. In determining whether a state was an appropriate target of an FCA action, the Stevens Court considered 31, United States Code, Section 3729(a), which subjects to liability

> [a]ny person . . . [who] knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.

Id. The Court applied its presumption that "person" does not include the sovereign, *id.*, at 780, which it determined was not a "hard and fast rule of exclusion," *id.*, at 781 (internal quotation and citation omitted), but one which a court could disregard only "upon some affirmative showing of statutory intent to the contrary." *Id.* The Court went on to hold that the liability provision of the FCA, as enacted in 1863,

> bore no indication that States were subject to its penalties. Indeed, far from indicating that *States* were covered, it did not even make clear that *private corporations* were, since it applied only to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," and imposed criminal penalties that included imprisonment. [FN11] Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. We do not suggest that these features directed only at natural persons cast doubt upon the courts' assumption that § 3729(a) extends to corporations, see, *e.g.*, *United States ex rel.*

> *Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 890 (C.A.10 1986)--but that is because the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively *covered* by the term "person," see 1 U.S.C. § 1. But the text of the original statute does less than nothing to overcome the presumption that States are *not* covered.

Id. at 782. The Court further held that the denotation of "persons" who could be subject to liability under the Act was contained in Section 3729, and nowhere else in the FCA--a section which "has remained in the statute unchanged since 1863." 529 U.S. at 783. The definition of person, as referenced by the *Stevens* Court, provides, as follows:

> [T]he words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .

Id.

> n7 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI.

Finally, the *Stevens* Court unequivocally found that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent

with state [*18] *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.*, at 784-85.

F. Split Among the Circuits

As has been well-briefed by the parties, there exists a split among the circuits that have considered the question of whether municipalities are subject to the FCA. The undersigned will briefly discuss each of the three decisions.

1. Seventh Circuit Finds No Municipal Immunity

In *United States ex rel. Chandler v. Hekotoen Inst. for Med. Research*, F.3d , 2002 U.S. App. LEXIS 847 (7th Cir. January 22, 2002), the Court of Appeals for the Seventh Circuit found that a county did not enjoy the protection of municipal immunity from the FCA. Specifically, the *Chandler* court held that Congress had made no *exception* in the FCA that would exempt municipalities. *Id.*, 2002 U.S. App. LEXIS at 11. In distinguishing its decision from that of the Supreme Court in *Stevens*, *supra*, which found as a significant factor in favor of immunity the inclusion of states in the Section 3733 definition of those subject to investigative demands but not included in the definition of persons liable under the Act, the court in *Chandler* held that a similar inclusion/exclusion of municipal governments gave rise to the opposite inference, *i.e.*, that Congress did intend to subject municipalities to FCA liability, because municipalities have traditionally been included in the definition of "persons" and do not enjoy the same "privilege of place within our constitutional structure" that states enjoy. *Id.*, at n.7.

To summarize, the *Chandler* court found that Congress intended to include municipalities in the FCA, because they have long been considered legal "persons"; a municipality, therefore, is included in the definitional section of the FCA; and Congress has made no exception in the FCA that would exclude municipalities from liability under the Act.

2. Fifth Circuit Finds Municipal Immunity

In *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), the Court of Appeals for the Fifth Circuit concluded that a municipality was not a "person" subject to liability under the FCA. Although predating *Chandler* and ultimately coming to an opposite conclusion, the court in *Garibaldi* made a number of conclusions of law that were similar to those in *Chandler*: the Supreme Court's decision in *Stevens* (*i.e.*, that a state is not amenable to suit under the Act) is not "particularly instructive," except in its finding that the FCA is punitive; local governments do not enjoy the same sovereign status as states; and in federal jurisprudence, a municipality traditionally is included in the definition of "persons." *Id.*, at 491.

The *Garibaldi* court went on to hold that the Supreme Court made clear that "imposing punitive damages on local governments is ordinarily contrary to sound public policy," *id.*, at 491, *citing City of Newport*, *supra*, at 263, and reasoned that "punishing a local government is pointless," because the punishment "in the form of higher taxes or reduced public services, is visited upon the blameless." *Id.* In

a vein similar to the Supreme Court in *City of Newport*, n8 the *Garibaldi* court likewise held, as follows:

> Though Congress is free to make that determination [that local governments are subject to treble damages under the FCA] if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act.

Id., at 492.

> n8 The Supreme Court held in *City of Newport* that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *City of Newport*, *supra*, at n.21.

While conceding that the term "persons," as traditionally used in federal jurisprudence, would include municipalities, and that municipalities would arguably be included in the residual definition of "persons" contained in the so-called Dictionary Act-- 1, United States Code, Section 1--the *Garibaldi* court went on to hold that by amending the FCA to provide for mandatory punitive damages, "the context indicates" that Congress intended "local governments not be subject to liability under the False Claims Act." *Id.*, at 492.

> We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term "person" in the liability provisions [*22] of the False Claims Act not include local governments.

Id., at 493.

The *Garibaldi* court also addressed the argument of the relator and the government that no municipal immunity should apply in the FCA, because the Supreme Court had earlier found that local governments were subject to punitive damage awards in other federal statutes, including civil rights and antitrust provisions. The court distinguished the leading case on the application of civil rights laws to municipalities, *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), finding that *Monell* was based on the legislative history of the Act, which clearly indicated that Congress intended to target those acting "under color of state law," especially local governments, which were taking private property without just compensation. *Garibaldi*, *supra*, at 493-94.

As to the application of antitrust laws to municipalities, the *Garibaldi* court held that the Supreme Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), was distinguishable because that Court had found the language of the Act to be "'comprehensive'" and a "'carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.'" *Garibaldi*, *supra*, at 494 (*quoting City of Lafayette*, *supra*, at 399). The *Garibaldi* court concluded that the Supreme Court had not extended municipal immunity, because the antitrust laws establish a "fundamental and all-encompassing regulatory regime for commercial activity," which would be equally applicable to municipalities that "go out into the marketplace and engage in this type of activity." *Id.*, at 494.

Relying upon *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, *supra*, which found that the FCA did not reach states, the *Garibaldi* court concluded that the FCA was not intended to be as far reaching as the antitrust laws.

To summarize *Garibaldi*, the Court of Appeals for the Fifth Circuit held that the punitive damages provision of the FCA shows a congressional intent that the FCA is inapplicable to municipal governments, because there is "no contrary expression of legislative intent" and no inapposite purpose "behind the False Claims Act" n9 that would advise otherwise.

n9 *Accord* United States ex rel. Long v. SCS Business & Technical Inst., Inc., 173 F.3d 870, 875 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000).

3. Third Circuit Finds Municipal Immunity

In the latest decision on point, the Court of Appeals for the Third Circuit in *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 2002 W.L. 111365 (3d Cir. January 29, 2002), found that the county defendant was not subject to suit under the FCA due to the Act's mandatory punitive damages provisions. As did the Supreme Court in *City of Newport*, *supra*, and the Court of Appeals for the Fifth Circuit in *Garibaldi*, the *Dunleavy* court found that local governments enjoyed immunity from punitive damages unless "Congress clearly provides otherwise . . . ." *Id.*, at 222. The court further held that to overcome common-law

immunity from punitive damage awards, Congress must "expressly abrogate" such immunity in the statute. *Id.*

The court went on to hold that the government's and relator's statement of the issue, *i.e.*, whether a municipality is a "person" under the Act, was just the "other side of the coin with the question before us," *id.*, which was whether Congress had "clearly abrogated local governmental immunity under the FCA." *Id.* The court first pointed to other examples where Congress had specifically defined the term "persons" to include municipalities, then turned to the FCA, as originally enacted in 1863 and in its present form, and found that the Act "is utterly devoid of any specific intention to subject local governments to its strictures." *Id.* The court held, as follows:

> [L]ack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Id.

An argument was presented in Dunleavy, which has also been presented here, that by enacting treble damages in 1986, Congress evidenced its intent to subject local governments to punitive damages. The court held that by enacting the treble damages provision, Congress did not express a clear intent to add anything to the meaning of person, and that such appellate court had previously determined that adding punitive damages to civil RICO manifested congressional "intent to *exclude* local governments from . . . coverage." *Id.* (emphasis in original).

As in *Garibaldi*, the *Dunleavy* court concluded that "imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." Id. Finally, the *Dunleavy* court found the *amicus* argument--that the intent of Congress could be discerned through the legislative history of the 1986 amendments--was without merit, inasmuch as the *Stevens* Court had already found such material "erroneous and of questionable value." *Id.* (citation omitted).

In summary, the *Dunleavy* court found that the FCA was punitive, and that in order to set aside common-law municipal immunity, Congress must clearly express its intent to abrogate such protection. Further, that court found that Congress had not clearly expressed such an intent in the FCA.

G. Discussion

The undersigned has considered the well-reasoned briefs of the parties, as well as the *amicus curie*, and appreciates the fine manner in which this issue has been presented. Each side has submitted persuasive arguments, and the court can see how either side could well carry its argument through the appellate process. For the reasons discussed below, however, the undersigned must respectfully recommend that defendants' motions to dismiss be allowed, inasmuch as municipal immunity has not been clearly waived by Congress in the False Claims Act. The discussion will first consider whether the FCA is punitive; second, whether a municipality is a "person" under the FCA; and finally,

whether Congress has abrogated common-law municipal immunity in the FCA.

1. Does the FCA Provide for Punitive Damages?

When the subject Act was created in 1863, Congress was not only at war and lacking revenue from more than a third of the formerly United States, it was also at economic war with its own suppliers of military ordnance. Enacted in the midst of civil war, the False Claims Act clearly was intended to stem the tide of fraud from dishonest private parties. *Stevens*, *supra*, at 781. For more than six-score years, the FCA remained virtually unchanged. *Harrison*, *supra*, at 783. In 1986, Congress gave the FCA teeth by providing substantial per-violation civil penalties, attorney fees, and treble damages. In addition to civil penalties, Congress split off the criminal penalties, making a false claim a five-year felony. *See* 18 U.S.C. § 287. As the Court of Appeals for the Fourth Circuit observed, the 1986 civil amendments were intended to unleash a "posse" of private whistle blowers. *Harrison*, *supra*, at 783.

The Supreme Court held in Stevens that the FCA's mandatory treble damages are "punitive in nature." *Id.*, at 784. The *amicus* conceded this point at oral arguments, and relator joined in such concession. The undersigned finds, as a matter of settled law, *id.*, that the mandatory damages provision of the FCA, which was created in the 1986 amendments, is punitive, while the prior scheme, which provided for double damages, was remedial. n10 Unlike many other state and federal provisions, imposition of

punitive damages under the FCA is mandatory, *i.e.*, a false claim must be punished with treble the actual damages.

n10 For the purpose of completeness, the undersigned notes that single or actual damages are compensatory.

2. Is a Municipality a Person Under the FCA?

Deciding whether a municipal government is a "person" under the present Act has caused a number of appellate courts to diverge and for logic to become fuzzy. As early as 1844, the Supreme Court recognized that towns, cities, and counties were something less than a full sovereign; they could breach contracts and commit torts; and they were more akin to a "person" than a king. *See Louisville R. Co. v. Letson*, 2 How. 497, 558, 11 L. Ed. 353 (1844) (commercial corporation is a citizen); *Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86 (1869) (reaffirming that a municipality is a citizen capable of being sued in federal court). Even before courts recognized that towns were "persons," they had recognized that they enjoyed common-law municipal immunity. *Mower v. Leicester*, 9 Mass. 247 (1812).

By 1863, when the FCA was enacted, it is clear that Congress knew (or should have known) that a municipality or a political body less than a sovereign state was a person. From 1863 through 1986, there is no doubt but that a municipality was a person, as contemplated by the FCA, which was at all relevant times thereto a remedial scheme. There are, however, no reported cases which this court can

find wherein a municipality challenged the pre-1986 FCA based on municipal immunity. n11

> n11 This may be so because pre-1986, damages were remedial and municipalities did not enjoy immunity from remedial damages, or, perhaps, no FCA actions had been filed against municipalities.

The undersigned agrees with the reasoning of the *Dunleavy* court that whether a municipality remains a person under the post-1986 Act is just the flip side of the issue of whether Congress intended to bring municipalities into federal court under the FCA. It is undisputed that the 1986 amendments left the definition of "persons" unscathed and that amendments prior to that date had made no substantive change since 1863. With the exception of a few growing pains, a municipality is no less a "person" today than it was in 1986, 1863, or 1844; however, the issue is not whether the attributes of personage have changed, but whether the statute has changed.

True, the Supreme Court has recognized that there is no municipal immunity from treble damages in civil-rights actions where a plaintiff can plead and prove the wrongful conduct was pursuant to municipal policy and in antitrust laws, even though no textual abrogation is found in either statute. In the civil-rights statutes, the Court found that they were conceived to circumvent municipal wrongdoing that struck at the heart of civil liberties, while in antitrust laws, Congress was so explicit in its draftsmanship as to leave no doubt that municipalities could run afoul of antitrust laws.

Assuming that a municipality is a "person" as, for all practical purposes, it has always been, the issue comes down to whether Congress intended to subject municipalities to treble damages under the FCA, which may be discerned from the language of the amended FCA, read as a whole.

3. Has Congress Abrogated Common-Law Immunity in the FCA?

As the Supreme Court has already held, the legislative history surrounding the 1986 amendments provides courts with little to no help. Stevens, supra. Instead, this court must step back and first consider the plain language of the Act.

Just as Congress in 1863 was charged with having known that the Supreme Court had recognized municipalities as persons when the FCA was enacted, so, too, must Congress in 1986 be charged with knowledge that the Supreme Court had clearly held in 1981 that in order to subject a town to punitive damages, Congress must clearly express its intent to abrogate common-law municipal immunity damages. *City of Newport*, *supra*, at n.21. While Congress clearly changed the scheme of the FCA from remedial to punitive in 1986, no change was made to the "persons" subject to the Act, and the only argument that can be championed is the same one that was relied upon by the Seventh Circuit--that Congress knew that municipalities were "persons," that Congress failed to exclude municipalities from coverage under the Act, and that a court can conclude therefrom that Congress intended to make municipalities liable for treble damages.

The problem with the Seventh Circuit decision in *Chandler* is that it relies upon the inverse of the Supreme

Court requirement for legislative abrogation of an immunity. While drawing reasonable inferences may be appropriate in usual instances of statutory construction, the Supreme Court has made it clear that courts will not infer congressional intent to abrogate common-law municipal immunity. The duty of Congress is to be explicit when it determines that municipalities should be subject to punitive damages. The decision of the Court of Appeals for Seventh Circuit, in finding that the FCA failed to expressly *exclude* municipalities after 1986, is inapposite to the requirement of *City of Newport* that Congress expressly *include* municipalities, because "no punitive damages are allowed unless expressly authorized by statute." *Id.*, at n.21. The undersigned does not believe that the Supreme Court would make the same exception to the general rule concerning municipal immunity that it did for civil-rights statutes and antitrust laws, inasmuch as the origin of the FCA was not civic corruption and the language of the FCA is not explicit.

This court has struggled with the implication that in dismissing this action, it may allow miscreants, at least in their official capacities, to go unpunished. As discussed below, although municipalities and officials sued in their official capacities may escape the FCA, it is not so clear that officials sued in their individual capacities are entitled to dismissal. Immunities have developed at common law, are a part of a system that must take into account equity, and courts seldom, if ever, *infer* legislative abrogation.

It is certainly within the power of Congress and other legislative bodies to legislate away immunities that have

been "legislated" by jurists through the common law; however, Congress must expressly and clearly state that the law reaches those who would otherwise enjoy an immunity. *City of Newport*, *supra*. While such a requirement may be viewed as judicial quibbling, it serves a valid purpose--to require Congress to provide the privilege holder with fair notice. Otherwise, common-law immunities will be dissolved at common law, resulting in exactly what has occurred here--differing and strained opinions of reasonable jurists making more common law and increasing uncertainty as to whether a common-law immunity can be relied upon.

The undersigned will recommend that the motions to dismiss of the municipal defendants, *eo nominee*, the counties, and defendants sued in their official capacities be granted. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (a suit against a government official, sued in his or her official capacity, is a suit against the governmental entity).

IV. Motions to Dismiss Individual Defendants Sued In Their Individual Capacities

Some of the individual defendants have moved for dismissal, contending that under the FCA, they cannot be sued unless it is alleged that they somehow personally gained from the alleged false claims. In addition, they argue that Rule 9(b), Federal Rules of Civil Procedure, requires more precise pleading, inasmuch as relator is alleging fraud, "which shall be stated with particularity." *Id.* Defendants also contend that the allegations are insufficient to support relator's claims of conspiracy.

Clearly, governmental officials can be sued in their individual capacities for allegedly corrupt acts done in their official capacities. *Hafer v. Melo*, 502 U.S. 21 (1991). While relator has cited cases outside this circuit in support of the proposition that Rule 9(b) should be applied in a more "relaxed" fashion, *see United States ex rel. Butler v. Magellan Health Services*, 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999), the prevailing view within this circuit is that Rule 9(b) applies with equal force to claims brought under the FCA:

> Since Appellant in this case alleges fraud, his claim is subject to Federal Rule of Civil Procedure 9(b), which requires that claimants plead fraud with particularity. According to two noted scholars, the "circumstances" required to be pled with particularity under Rule 9(b) are "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Mere allegations of "fraud by hindsight" will not satisfy the requirements of Rule 9(b). The second sentence of Rule 9(b) allows conclusory allegations of defendant's knowledge as to the true facts and of defendant's intent to deceive.
>
> Rule 9(b) has four purposes: First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it

> on notice of the conduct complained of. . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783-84 (4th Cir. 1999)(citations and footnote omitted).

The allegations of both fraud and conspiracy in the complaint are scattershot and do not contain allegations of the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Id.* If it is important enough to the relator to bring an action and subject a person to the enormous expense and burden of defending his or her actions, it is important enough that the relator make specific allegations as to each and every defendant and as to each and every contention of alleged wrongdoing. The undersigned finds, however, that the proposed dismissal is a harsh penalty for failure to comply with Rule 9(b) n12 and will recommend that the district court allow relator's Motion to Amend, but with provisos: that relator carefully reconsider the scope and breadth of her complaint, whether she has reason within the bounds of Rule 11 to bring each of these defendants into this forum, and whether she can provide sufficient allegations within the bounds of Rule 9(b). Finally, it would appear that there is some authority for the

proposition that for individual-capacity liability to attach under the FCA, some allegation of personal gain should be made. *United States. ex. Rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998); *United States ex rel. Honeywell, Inc. v. San Francisco Housing Authority*, 2001 U.S. Dist. LEXIS 9743, F. Supp. 2d , 2001 WL 793300 (N.D.Cal. 2001).

> n12 "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Id.*

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that:

(1) defendants Graham County Board of County Commissioner's, Raymond Williams's, Dale Wiggins's, and Lynn Cody's motion to dismiss (#31) be **DENIED** in part and **GRANTED** in part, and that the Graham County Board of County Commissioners and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their

individual capacities, be **DENIED** without prejudice;

(2) defendants Cherokee County Soil & Water Conservation District's, Bill Tipton's, Eddie Wood's, and C. B. Newton's motion to dismiss and for more definite statement (#61) be **DENIED** in part and **GRANTED** in part, and that the Cherokee County Soil & Water Conservation District and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their individual capacities, be **DENIED** without prejudice;

(3) defendants Cherokee County Board of County Commissioner's, Charles Laney's, Eugene Morrow's, and George Postell's motion to dismiss (#62) be **DENIED** in part and **GRANTED** in part, and that the Cherokee County Board of County Commissioners and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their

individual capacities, be **DENIED** without prejudice;

(4) Relator's Motion for Leave to Amend Her Complaint (#75) be **ALLOWED** and that relator be granted leave to amend to comply with Rule 9(b); and

(5) defendants Graham County Soil & Water Conservation District's, Gerald Phillips's, Allen DeHart's, Jimmy Orr's, and Lloyd Millsaps's motion to dismiss (#77) be **DENIED** in part and **GRANTED** in part, and that the Graham County Soil & Water Conservation District and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their individual capacities, be **DENIED** without prejudice.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within ten (10) days of service of same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*,

474 U.S. 1111 (1986); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984).

This 25th day of MARCH, 2002.

MAX O. COGBURN, JR.
UNITED STATES MAGISTRATE JUDGE

FOURTH CIRCUIT RULING ON PETITION FOR REHEARING AND REHEARING EN BANC (DENIED), DATED JUNE 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
June 28, 2004
No. 03-1122
CA-01-19-2

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON

Plaintiff – Appellant

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILL BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY

Defendants – Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR;

FOURTH CIRCUIT RULING ON PETITION FOR REHEARING AND REHEARING EN BANC (DENIED), DATED JUNE 28, 2004

BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99

Defendants.

On Petition for Rehearing and Rehearing En Banc

Appellees Cherokee County, Tipton, Newton, and Wood filed a petition for rehearing and rehearing en banc. Appellees Graham County, Phillips, Dehart, and Millsaps filed a petition for rehearing and rehearing en banc which joined in and incorporated by reference the petition filed by Cherokee et al.

Judge Wilkinson voted to grant panel rehearing. Judges Duncan and Michael voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Duncan for the Court.

For the Court,
/s/ Patricia S. Connor
CLERK

28 U.S.C. § 3729 (2003) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts.— Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without

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completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

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the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt for disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C.S. § 3730 (2004) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the

court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the

defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the

31 U.S.C.S. § 3730 (2004) (FALSE CLAIMS ACT)

Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and

shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by

a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on

31 U.S.C.S. § 3730 (2004) (FALSE CLAIMS ACT)

the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C.S. § 3731 (2004) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3731. False claims procedure

(a) A subpena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of

31 U.S.C.S. § 3731 (2004) (FALSE CLAIMS ACT)

Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C.S. § 3732 (2004) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

31 U.S.C.S. § 3733 (2004) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express

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demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which

is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any

such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would

have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed

to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in

such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand

served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send

the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of

the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS § § 6001 et seq.].

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of

information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return

to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil

investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

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(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person

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filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the

petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any

petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

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(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).